

APPENDIX C

CHAPTER 11, 2006 OPERATIONAL LAW HANDBOOK

FISCAL LAW

REFERENCES

1. Contract & Fiscal Law Department, TJAGLCS, *Fiscal Law Deskbook*.
2. The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpublished).
3. The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (Honduras).
4. DoD Directive 7250.13, *Official Representation Funds* (ORFs) (Feb. 17, 2004 w/ Jan. 12, 2005 change).
5. Dep't of Army Reg. 37-47, Representation Funds of the Secretary of the Army (March 12, 2004).
6. DoD Directive 7280.4, *Commander in Chief's Initiative Fund* (Oct. 26, 1993).
7. CJCSI 7401.01A, *Combatant Commander Initiative Fund* (Aug. 15, 2003).
8. The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpublished).
9. DoD Directive 2205.2, Humanitarian and Civic Assistance Provided in Conjunction with Military Operations (Oct. 6, 1994).
10. DoD Instruction 2205.3, Implementing Procedures for the Humanitarian and Civic Assistance Program (Jan. 27, 1995).
11. 10 U.S.C. § 166a, Combatant Commanders' Initiative Funds.
12. 10 U.S.C. § 401, Humanitarian and Civic Assistance (HCA).
13. 10 U.S.C. § 402, Transportation of Humanitarian Relief Supplies to Foreign Countries.
14. 10 U.S.C. § 404, Foreign Disaster Assistance.
15. 10 U.S.C. § 1050, Latin American (LATAM) Cooperation.
16. 10 U.S.C. § 1051, Bilateral Regional Cooperation Programs.
17. 10 U.S.C. § 2010, Combined Exercises.
18. 10 U.S.C. § 2011, Special Operations Training.
19. 10 U.S.C. § 2341-50, Acquisition and Cross Servicing Agreements.
20. 10 U.S.C. § 2557, Excess Non-Lethal Supplies.
21. 10 U.S.C. § 2561, Humanitarian Assistance (HA).
22. 22 U.S.C. § 2318 & 2348, Presidential Drawdowns.
23. 22 U.S.C. § 2347, International Military Education and Training Program (IMET).
24. 22 U.S.C. § 2761, Foreign Military Sales (FMS) Program.
25. 22 U.S.C. § 2763, Foreign Military Financing Program (FMFP).
26. 22 U.S.C. § 2770a, Reciprocal Training.
27. 31 U.S.C. § 1301(a), Purpose Statute.
28. Foreign Assistance Act of 1961, 75 Stat. 434, as amended and codified at 22 U.S.C. §§ 2151-2349aa-9 (FAA).
29. Arms Export Control Act of 1976, 90 Stat. 734, as amended and codified at 22 U.S.C. 2751-2796c (AECA).
30. Senate Committee on Foreign Relations & House Committee on Foreign Affairs, Legislation on Foreign Relations Through 1999, vols. I--A and I--B, (Apr 2000) (containing up-to-date printing of the FAA and AECA and reflecting all current amendments, as well as relevant portions of prior year authorization and appropriations acts which remain in effect).
31. Foreign Operations, Export Financing, and Related Programs Appropriations Acts, passed yearly (FOAA).
32. Department of Defense Appropriations Act, passed yearly.
33. National Defense Authorization Act (NDAA), passed yearly.
34. 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, P.L. 107-206, 2 August 2002.
35. Afghanistan Freedom Support Act of 2002, P.L. 107-327, 4 December 2002.

36. Emergency Wartime Supplemental Appropriations Act, 2003, P.L. 108-11, 16 April 2003.
37. Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, P.L. 108-106, 6 November 2003.
38. Executive Order No. 11958, Jan. 18, 1977, 42 Fed. Reg. 4311 (assigns Security Assistance responsibilities among the Executive departments).
39. U.S. Department of State, Congressional Presentation Foreign Operations Fiscal Year 2003 (CPD).
40. SECDEF MSG 100935Z MAR 03, SUBJ: Guidance for FY04 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities.
41. DoD 5105.38-M, Security Assistance Management Manual (SAMM), Oct. 3, 2003.
42. DoDD 5105.65, Defense Security Cooperation Agency (DSCA), Oct. 31, 2000.
43. DoDD 5105.47, U.S. Defense Representative (USDR) in Foreign Countries, Sep. 20, 1991.
44. AR 12-15 / AFR 50-29 / SECNAVINST 4950.4, Security Assistance and International Logistics: Joint Security Assistance Training (JSAT) Regulation, June 5, 2000 (AR 12-15).
45. Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., February 2004.
46. Karin Tackaberry, *Judge Advocates Play a Major Role in rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program*, ARMY LAW., February 2004.

I. INTRODUCTION

A. The application of fiscal principles often appears counterintuitive. Because Congress provides appropriations for military programs, and military departments in turn allocate funds to commands, commanders may wonder why legal advisors scrutinize the fiscal aspects of mission execution so closely, even though expenditures or tasks are not prohibited specifically. Similarly, JTF staff members managing a peacekeeping operation may not appreciate readily the subtle differences between operational necessity and “mission creep;” nation building and humanitarian and civic assistance; or construction, maintenance and repair. Deployed judge advocates (JA) often find themselves immersed in such issues. When this occurs, they must find affirmative fiscal authority for a course of action, suggest alternative means for accomplishing a task, or counsel against the proposed use of appropriated funds, personnel, or assets. To aid legal advisors in this endeavor, this chapter affords a basic, quick reference to common authorities. Because fiscal matters are so highly legislated, regulated, audited and disputed, however, it is not a substitute for thorough research and sound application of the law to specific facts. One possible source for an example of previous application of the law to specific facts is the compilation of AARs that CLAMO has put together on various past operations.

B. The principles of Federal appropriations law permeate all Federal activity, both within the United States, as well as overseas. Thus, there are few “contingency” exceptions to the fiscal principles discussed throughout this chapter. The statutes, regulations, case law and policy applicable at Fort Drum, for example, likely will control operations in Bosnia, Nicaragua, Hungary, Afghanistan and Iraq. Fiscal issues arise frequently during drug interdiction, humanitarian and civic assistance, security assistance, disaster relief, and peacekeeping operations. Failure to understand fiscal nuances may lead to the improper expenditure of funds and administrative and/or criminal sanctions against those responsible for funding violations. Moreover, early and continuous JA involvement in mission planning and execution is essential. JAs who participate actively will have a clearer view of the command's activities and an understanding of what type of appropriated funds, if any, are available for a particular need.

C. Under the Constitution, Congress raises revenue and appropriates funds for Federal agency operations and programs. *See* U.S. Const., Art. I, § 8. Courts interpret this constitutional authority to mean that Executive Branch officials, *e.g.*, commanders and staff members, must find affirmative authority for the obligation and expenditure of appropriated funds.¹ *See, e.g., U.S. v. MacCollom*, 426 U.S. 317, at 321 (1976) (“The established rule is that the

¹ An obligation arises when the government incurs a legal liability to pay for its requirements, *e.g.*, supplies, services or construction. For example, a contract award normally triggers a fiscal obligation. Commands also incur obligations when they obtain goods and services from other U.S. agencies or a host nation. An expenditure is an outlay of funds to satisfy a legal obligation. Both obligations and expenditures are critical fiscal events.

expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”) Likewise, in many cases, Congress has limited the ability of the Executive to obligate and expend funds through annual authorization or appropriations acts or in permanent legislation.

D. Legal advisors should consider several sources that define fund obligation and expenditure authority: (1) Title 10, U.S. Code; (2) Title 22, U.S. Code; (3) Title 31, U.S. Code; (4) Department of Defense (DoD) authorization acts; (5) DoD appropriations acts; (6) agency regulations; and (7) Comptroller General decisions. Without a clear statement of positive legal authority, the legal advisor should be prepared to articulate a rationale for an expenditure which is “necessary and incident” to an existing authority.

E. Road map for this Chapter. This Chapter is divided into several sections. Sections II through V provide an overview of Basic Fiscal Controls – Purpose, Time and Amount. Section VI highlights a method of analysis that JAs might apply to resolving fiscal law questions. Section VII highlights various DoD appropriations and their purposes. Section VIII addresses Foreign Assistance, including Security Assistance and Development Assistance, with particular focus on DoD’s role in each of these areas. Section IX details DoD’s Title 10 and other authorities to conduct Military Cooperative Programs and Humanitarian Operations, to include the Commanders’ Emergency Response Program (CERP). Section X provides a discussion of DoD support to Multilateral Peace and Humanitarian Operations, particularly U.S. participation in UN operations. Sections XI and XII highlight current funding authorities in relation to combating terrorism and funding reconstruction operations in Iraq and Afghanistan. Because DoD frequently finds itself involved in construction during its deployments, Section XIII provides a discussion of the relevant authority and funding sources. Finally, Section XIV notes the requirement that DoD notify Congress before transferring any defense articles or services to another nation or international organization.

II. BASIC FISCAL CONTROLS²

A. Congress imposes fiscal controls through three basic mechanisms, each implemented by one or more statutes. The U.S. Comptroller General, who heads the Government Accountability Office (GAO), audits executive agency accounts regularly, and scrutinizes compliance with the fund control statutes and regulations. The three basic fiscal controls are as follows:

1. Obligations and expenditures must be for a proper purpose;
2. Obligations must occur within the time limits applicable to the appropriation (*e.g.*, operation and maintenance (O&M) funds are available for obligation for one fiscal year); and
3. Obligations must be within the amounts authorized by Congress.

III. THE PURPOSE STATUTE—GENERALLY

A. Although each fiscal control is key, the “purpose” control is most likely to become an issue during military operations. The Purpose Statute provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” *See* 31 U.S.C. § 1301(a). Thus, expenditures must be authorized by law (permanent legislation or annual appropriations act) or be reasonably related to the purpose of an appropriation. JAs should ensure, therefore, that:

1. An expenditure fits an appropriation (or permanent statutory provision), or is for a purpose that is necessary and incident to the general purpose of an appropriation;
2. The expenditure is not prohibited by law;

² For a more in-depth review of fiscal law issues, *See*, CONTRACT & FISCAL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK, current edition. Available at: <http://jagcnet.army.mil/ContractLaw>, (registration & password required) and <http://www.jagcnet.army.mil/tjagsa>. (No password or registration required.)

3. The expenditure is not provided for otherwise, *i.e.*, it does not fall within the scope of some other appropriation. *See, e.g., The Honorable Bill Alexander*, B-213137, Jan. 30, 1986 (unpub.) [hereinafter Honduras II] (concluding that the Purpose Statute applies to OCONUS military exercises); *The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (1984) [hereinafter Honduras I]; *Secretary of the Interior*, B-120676, 34 Comp. Gen. 195 (1954).

B. Augmentation of Appropriations and Miscellaneous Receipts.

1. A corollary to the Purpose control is the prohibition against augmentation. *See Nonreimbursable Transfer of Admin. Law Judges*, B-221585, 65 Comp. Gen. 635 (1986); *cf.* 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as authorized by law). Appropriated funds designated for a general purpose may not be used for another purpose for which Congress has appropriated other funds. *Secretary of the Navy*, B-13468, 20 Comp. Gen. 272 (1940). If two funds are equally available for a given purpose, an agency may elect to use either, but once the election is made, the agency must continue to charge the same fund. *See Funding for Army Repair Projects*, B-272191, Nov. 4, 1997. The election is binding even after the chosen appropriation is exhausted. *Honorable Clarence Cannon*, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard.)

2. If an agency retains funds from a source outside the normal fund distribution process, an augmentation has occurred and the Miscellaneous Receipts Statute is violated. *See* 31 U.S.C. § 3302(b); *see also Interest Earned on Unauthorized Loans of Fed. Grant Funds*, B-246502, 71 Comp. Gen. 387 (1992). When the retained funds are expended, this generally violates the constitutional requirement for an appropriation. *See Use of Appropriated Funds by Air Force to Provide Support for Child Care Centers for Children of Civilian Employees*, B-222989, 67 Comp. Gen. 443 (1988); *Bureau of Alcohol, Tobacco, and Firearms--Augmentation of Appropriations--Replacement of Autos by Negligent Third Parties*, B-226004, 67 Comp. Gen. 510 (1988).

3. **Exceptions.** There are, however, statutory exceptions to the augmentation prohibition.

a. There are intra- and intergovernmental acquisition authorities that allow augmentation or retention of funds from other sources. *See, e.g., Economy Act*, 31 U.S.C. § 1535; *Foreign Assistance Act (FAA)*, 22 U.S.C. § 2344, 2360, 2392 (permitting foreign assistance accounts to be transferred and merged); 22 U.S.C. § 2318 (emergency Presidential drawdown authority). The Economy Act authorizes a Federal agency to order supplies or services from another agency. For these transactions, the requesting agency must reimburse the performing agency fully for the direct and indirect costs of providing the goods and services. *See Washington Nat'l Airport; Fed. Aviation Admin.*, B-136318, 57 Comp. Gen. 674 (1978) (depreciation and interest); *Obligation of Funds Under Mil. Interdepartmental Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980); *see also DoD 7000.14-R*, vol. 11A, ch. 1, para. 010201.J. (waiving overhead for transactions within DoD). Consult agency regulations for order approval requirements. *See, e.g., Federal Acquisition Regulation Subpart 17.5*; *Defense Federal Acquisition Regulation Subpart 217.5*; *Army Federal Acquisition Regulation Supplement Subpart 17.5*.

b. Congress also has authorized certain expenditures for military support to civil law enforcement agencies (CLEA) in counterdrug operations. *See* the Domestic Operations chapter for a more complete review. Support to CLEAs is reimbursable unless it occurs during normal training and results in DoD receiving a benefit substantially equivalent to that which otherwise would be obtained from routine training or operations. *See* 10 U.S.C. § 377. Another statutory provision authorizes operations or training to be conducted for the sole purpose of providing CLEAs with specific categories of support. *See* §1004 of the 1991 Defense Authorization Act, codified at 10 U.S.C. § 374. In 10 U.S.C. § 124, Congress assigned DoD the operational mission of detecting and monitoring international drug traffic (a traditional CLEA function). By authorizing DoD support to CLEAs at essentially no cost, Congress has authorized augmentation of CLEA appropriations.

C. Purpose Statute Violations.

1. As noted at the beginning of this chapter, the Purpose Statute provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” *See* 31 U.S.C. § 1301(a). Thus, if the command uses funds for an improper purpose, it must adjust the accounts by deobligating the funds used erroneously and seek the proper appropriation. For example, if the command constructs

an \$850,000 (funded costs) building with O&M funds, it has violated the Purpose Statute. (Remember, O&M is normally proper only for projects with funded costs up to \$750,000.)

2. To correct this violation, the command must deobligate the O&M funds and substitute (obligate) Unspecified Minor Military Construction (UMMC) funds, which are available for projects between \$750,000 and \$1.5 million. This account adjustment is typically an internal adjustment of the agency's accounting records and does not normally require a recovery of the actual payment disbursed to the contractor or other payee. While this is a matter of adjusting agency accounts, if proper funds (UMMC) were unavailable both at the time of the original obligation, *e.g.*, contract award, and when the adjustment is made, the command must report a potential Anti-Deficiency Act (ADA) violation. *See* discussion of the ADA, below. The same analysis applies if the command uses O&M funds to purchase what are considered to be investment items, *e.g.*, equipment or systems that are either centrally managed or cost \$250,000 or more. Finally, if a command uses funds for a purpose for which there is no appropriation, this is an uncorrectable Purpose Statute violation, and officials must report a potential ADA violation.

IV. AVAILABILITY OF FUNDS AS TO TIME

A. The "Time" control includes two major elements:

1. Appropriations have a definite life span; and
2. Appropriations normally must be used for the needs that arise during their period of availability.

B. Period of availability. Most appropriations are available for a finite period. For example, O&M funds (the appropriation most prevalent in an operational setting) are available for one year; Procurement appropriations are available for three years; and Construction funds have a five-year period of availability. If funds are not obligated during their period of availability, they expire and are unavailable for new obligations (*e.g.*, new contracts or changes outside the scope of an existing contract). Expired funds may be used, however, to adjust existing obligations (*e.g.*, to pay for a price increase following an in-scope change to an existing contract).

C. The "bona fide needs rule." This rule provides that funds are available only to satisfy requirements that arise during their period of availability, and will affect which fiscal year appropriation you will use to acquire supplies and services. *See* 31 U.S.C. § 1502(a).

1. Supplies. The bona fide need for supplies normally exists when the government actually will be able to use the items. Thus, a command would use a currently available appropriation for office supplies needed and purchased in the current fiscal year. Conversely, commands may not use current year funds for office supplies that are not needed until the next fiscal year. Year-end spending for supplies that will be delivered within a reasonable time after the new fiscal year begins is proper, however, as long as a current need is documented. Note that there are lead-time and stock-level exceptions to the general rule governing purchases of supplies. The lead-time exception allows the purchase of supplies with current funds at the end of a fiscal year even though the time period required for manufacturing or delivery of the supplies may extend over into the next fiscal year. The stock-level exception allows agencies to purchase sufficient supplies to maintain adequate and normal stock levels even though some supply inventory may be used in the subsequent fiscal year. *See* Defense Finance and Accounting Service Reg.--Indianapolis 37-1 [DFAS-IN 37-1], Chapter 8; or DoD Financial Management Regulation 7000.14-R, vol. 3, para. 080303. In any event, "stockpiling" items is prohibited. *See* Mr. H.V. Higley, B-134277, Dec. 18, 1957 (unpub.).

2. Services. Normally, severable services are bona fide needs of the period in which they are performed. Grounds maintenance, custodial services and vehicle/equipment maintenance are examples of severable services because of the recurring "day-to-day" need. Use current year funds for recurring services performed in the current fiscal year. As an exception, however, 10 U.S.C. § 2410a permits DoD agencies to obligate funds current at the time of award for a severable services contract (or other agreement) with a period of performance that does not exceed one year. Even if some services will be performed in the subsequent fiscal year, current fiscal year funds can be used to fund the full year of severable services. Conversely, nonseverable services are bona fide needs of the year in which a contract (or other agreement) is executed. Nonseverable services are those that contemplate a single undertaking, *e.g.*, studies, reports, overhaul of an engine, painting a building, etc. Fund the entire undertaking with

appropriations current when the contract (or agreement) is executed, even if performance extends into a subsequent fiscal year. *See* DFAS-IN 37-1, ch. 8.

V. AVAILABILITY OF APPROPRIATIONS AS TO AMOUNT

A. The Anti-Deficiency Act (31 U.S.C. §§ 1341(a), 1342, & 1517(a)) prohibits any government officer or employee from:

1. Making or authorizing an expenditure or obligation in advance of or in excess of an appropriation. (31 U.S.C. § 1341)
2. Making or authorizing an expenditure or incurring an obligation in excess of a formal subdivision of funds; or in excess of amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). (31 U.S.C. § 1517)
3. Accepting voluntary services, unless authorized by law. (31 U.S.C. § 1342)

B. Commanders must ensure that fund obligations and expenditures do not exceed amounts provided by higher headquarters. Although over-obligation of an installation O&M account normally does not trigger a reportable ADA violation, an over-obligation locally may lead to a breach of a formal O&M subdivision at the Major Command level. *See* 31 U.S.C. § 1514(a) (requiring agencies to subdivide and control appropriations by establishing administrative subdivisions); 31 U.S.C. 1517; DFAS-IN 37-1, ch. 4. Similarly, as described in the Purpose section, above, over-obligation of a statutory limit, *e.g.*, the \$750,000 O&M threshold for construction, may lead to an ADA violation.

C. Commanders must investigate suspected violations to establish responsibility and discipline violators. Regulations require “flash reporting” of possible ADA violations. DoD 7000.14-R, Financial Management Regulation, vol. 14, chs. 3-7; DFAS-IN 37-1, ch. 4, para. 040204. If a violation is confirmed, the command must identify the cause of the violation and the senior responsible individual. Investigators file reports through finance channels to the office of the Assistant Secretary of the Army, Financial Management & Comptroller (ASA (FM&C)). Further reporting through OSD and the President to Congress also is required if ASA (FM&C) concurs with a finding of violation. By regulation, commanders must impose administrative sanctions on responsible individuals. Criminal action also may be taken if a violation was knowing and willful, 31 U.S.C. §1349, §1350. Lawyers, commanders, contracting officers, and resource managers all have been found to be responsible for violations. Common problems that have triggered ADA violations include the following:

1. Without statutory authority, obligating (*e.g.*, awarding a contract) current year funds for the bona fide needs of a subsequent fiscal year. This may occur when activities stockpile supply items in excess of those required to maintain normal inventory levels.
2. Exceeding a statutory limit (*e.g.*, funding a construction project in excess of \$750,000 with O&M; acquiring investment items with O&M funds).
3. Obligating funds for purposes prohibited by annual or permanent legislation.
4. Obligating funds for a purpose for which Congress has not appropriated funds, *e.g.*, personal expenses where there is no regulatory or case law support for the purchase).

VI. THE PURPOSE STATUTE—SPECIFIC MILITARY OPERATIONAL ISSUES

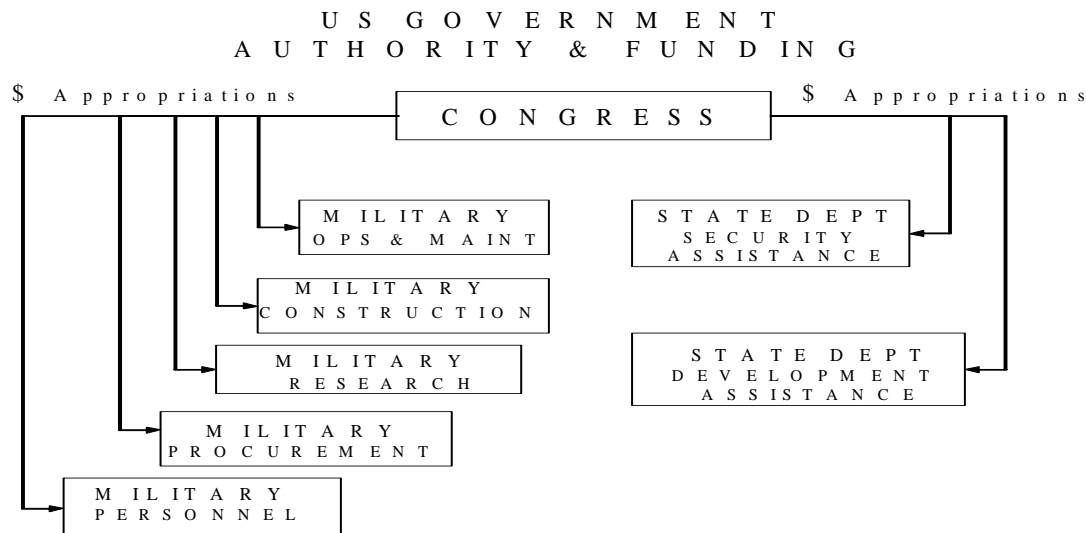
A. **Method of Analysis.** JAs enhance mission success by guiding the staff and commander to the appropriate fiscal authority. The following method of analysis will help the attorney, operator, comptroller and logistician formulate a course of action for the commander:

1. Determine the commander’s intent;

2. Define the mission (both the organization's assigned mission and the specific tasks to be performed);
3. Divide it into discrete parts (specified and implied tasks);
4. Find legislative or regulatory authority and determine the proper fund type;
5. Articulate a sound rationale for the specific expenditures; and
6. Seek approval/guidance/funds from higher headquarters, if necessary.

B. It may be necessary to review an appropriation or permanent statutory provision to determine Congressional intent. For proposed expenditures that are non-routine or unique in nature, a clear, written rationale explaining why the use of funds is proper is essential. Again, if the issues are particularly problematic, seek assistance from higher headquarters.

VII. DOD APPROPRIATIONS AND THEIR PURPOSES



A. **O&M Appropriations.** These appropriations are for day-to-day expenses of DoD components in garrison and during exercises, deployments, and military operations. Commands may use O&M appropriations for all “necessary and incident” operational expenses. However, they are subject to specific statutory limitations. For example, end items costing \$250,000 or more, or which are centrally managed, may not be purchased with these funds. *See* DoD 7000.14-R, vol. 2A, ch. 1, para. 0102; and DFAS-IN Manual 37-100-XX (XX= current FY). Additionally, exercise-related construction for U.S. forces’ use (*e.g.* base camps, etc.; not for humanitarian assistance construction) during exercises coordinated or directed by the Joint Chiefs of Staff outside the United States, or any construction in excess of \$750,000, may not be funded with O&M appropriations. *See* 10 U.S.C. § 2805; *but see* Military Construction (MILCON) -- A Special Problem Area, *infra*, (discussing use of O&M for construction necessary to meet temporary operational needs during combat or declared contingencies).

B. O&M Appropriations—Use During Deployments and Contingency Operations.

1. **“Contingency Operations (ConOps) Funds” (aka OEF/OIF Funds).** Technically, there is not a separate appropriation for the incremental expenses of a contingency operation or other specific operations such as Operation Iraqi Freedom(OIF). These incremental expenses (that are above and beyond the planned day-to-day expenses of DoD such as typical exercises and other training activities) are funded with existing appropriations, through various supplemental appropriations acts, and various transfer authorities. An example of a supplemental appropriation using a transfer authority is the **Iraq Freedom Fund (IFF)**. *See* Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11 (Apr. 16, 2003) (initial funding of the IFF); DoD Appropriations Act for FY 2005, Pub. L. No. 108-127 (2004) (additional \$3.8B to remain available until 30 September 2006). The IFF consists of appropriated funds that can be transferred into various other appropriations accounts (O&M, military personnel, procurement, RDT&E, etc.) for ongoing operations in Iraq or Afghanistan. DoD provides regulatory control over these funds and other “ConOps funds” to provide accountability and ensure the funds are used to support the incremental expenses of these contingency operations. *See* DoD Reg. 7000.14-R, DoD Financial Management Regulation, vol. 12, ch. 23.

2. **Emergency and Extraordinary (E&E) Expenses Funds.** These are special funds within the O&M appropriation under 10 U.S.C. § 127. The secretaries of the military departments and the Secretary of Defense (SECDEF) may expend these funds without regard to other provisions of law. These funds are very limited in amount, however, and regulatory controls apply to prevent abuse, including congressional notification requirements for expenditures over \$500,000. Recently, E&E expense funds were used in conjunction with Presidential Drawdown authority, and Combatant Commander Initiative funds, both discussed below, to cover the costs of training and equipping the new Afghan National Army. Additionally, a commander would not use generic O&M to purchase a memento or gift for the mayor of Tuzla. Official representation funds (authorized under 10 U.S.C. § 127), however, would be available for this purpose. *See* DoD Dir. 7250.13, OFFICIAL REPRESENTATIONAL FUNDS (17 Feb. 2004); DEPT OF ARMY, REG. 37-47, REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY, (12 March 2004); and, DEPT OF ARMY, REG. 195-4, USE OF CONTINGENCY LIMITATION .0015 FUNDS FOR CRIMINAL INVESTIGATIVE ACTIVITIES (15 Apr. 1983).

3. **Contingency Operations Funding Authority.** This authority, under 10 U.S.C. § 127a (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003 (1996)), applies to certain deployments as outlined below.

a. This authority applies to deployments, other than for training, and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which:

(1) Funds have not been provided;

(2) Operations are expected to exceed \$50 million; or

(3) The incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of **\$100 million**.

b. This authority does *not* apply to operations with incremental costs not expected to exceed **\$10 million**. The authority provides for the waiver of Working Capital Fund (WCF) reimbursements. Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. This statute restricts SECDEF authority to reimburse WCF activities from O&M accounts. (In addition, if any activity director determines that absorbing these costs could cause an ADA violation, reimbursement is required.) The statute authorizes SECDEF to transfer up to \$200 million in any fiscal year to reimburse accounts used to fund operations for incremental expenses incurred. Due to provisions requiring both Congressional notification and GAO compliance reviews, this statute is rarely used. Similar to the Iraq Freedom Fund, this transfer authority funding is regulated by volume 12, chapter 23 of the DoD Financial Management Regulation, DoD 7000.14-R.

4. **Combatant Commander (formerly CINC) Initiative Funds (CCIF)** (10 U.S.C. § 166a) are O&M funds available for special training, humanitarian and civic assistance, incremental costs of third country participation in a combined exercise, and operations that are unforeseen contingency requirements critical to combatant commander joint warfighting readiness and national security interests. *See* CJCSI 7401.01B (15 Aug.

2003) (detailing procedures for CJCS approval of these expenditures). Recently, the statute has been amended to provide an increase in the current spending limits for different purchases within the fund. The limits have changed as follows: for equipment, from \$7 million to \$10 million; for joint exercises, from \$1 million to \$10 million; and for military education and training from \$2 million to \$5 million.

5. **“Traditional CINC Activities” Funding (TCA).** The combatant commanders also receive O&M funding through the service component commands for TCA, like military-to-military contacts, combined training, and regional conferences.

C. Military Construction (MILCON) Appropriations. Congress scrutinizes military construction closely. In fact, 41 U.S.C. § 12 provides that no public contract relating to erection, repair, or improvements of public buildings shall bind the Government for funds in excess of the amount specifically appropriated for that purpose. Thus, construction projects in excess of \$1.5 million require specific approval by Congress. While not requiring specific “line-item” approval, projects between \$750,000 and \$1.5 million are limited to amounts provided in the Unspecified Minor Military Construction (UMMC) appropriations within the MILCON appropriation. *See* 10 U.S.C. §2805.

D. Procurement Appropriations. These appropriations fund purchases of investment end items (or systems) that cost \$250,000 or more and items that are centrally managed, regardless of cost. *See* DoD 7000.14-R, vol. 2A, ch. 1, para. 010201.

E. Additional Appropriations and/or Authorities. DoD has available to it other appropriations and support authorities. These include funds and/or authority to use an existing funding source under the Foreign Assistance Act (FAA)(Title 22), the Acquisition and Cross-Servicing statute (10 U.S.C. §2341-50), and the Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA) appropriations (Title 10). Congress appropriates funds to be used only for specific purposes. For example, the O&M title of the appropriations act includes funding for humanitarian assistance authorized under various Title 10 provisions. (10 U.S.C. §401 – Demining and 10 U.S.C. §2561 – Humanitarian Assistance) *See, e.g.,* Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, (2004) (providing \$59 million for OHDACA available during FYs 2005-2006). Such earmarked appropriations require separate fiscal accounting. Generally, DoD may not use generic O&M appropriations for the same purposes as funds earmarked for specific purposes within an appropriations act.

VIII. FOREIGN ASSISTANCE AND SECURITY ASSISTANCE

A. Introduction.

1. As noted in Part VII, O&M appropriations pay for the day-to-day expenses of training, exercises, contingency missions, and other deployments. Deploying units normally use “generic” O&M funds to support their operations. Examples of O&M expenses include force protection measures, sustainment costs, and repair of main supply routes. Included also are those expenses that are “necessary and incident” to an assigned military mission (*e.g.*, costs of maintaining public order and emergency health and safety requirements of the populace in Haiti during the Presidentially-directed mission of establishing a secure and stable environment). Beware of “mission creep,” however, where the military mission departs from security, combat, or combat-related activity, and begins to intersect other agencies’ authority/appropriations. Such expenditures bear close scrutiny by the JA. For example, commanders must have special authorization before engaging in “nation-building” activities or recurring refugee assistance. These activities normally fall within the category of foreign assistance functions administered by the Department of State (DoS) or U.S. Agency for International Development (USAID).

2. **General Rule:** DoS has the primary responsibility, authority and funding to conduct foreign assistance on behalf of the United States government.

3. The United States military has engaged in operations and activities that benefit foreign nations for many decades. The authorities and funding sources for these operations and activities have evolved into a relatively confusing mesh of statutes, annual appropriations, regulations, directives, messages and policy statements. The key issue is deciding whether DoS authority (under Title 22 of the U.S. Code) and money, or DoD authority (under Title 10 of the U.S. Code) and money should be used to accomplish a particular objective. This sophisticated task often

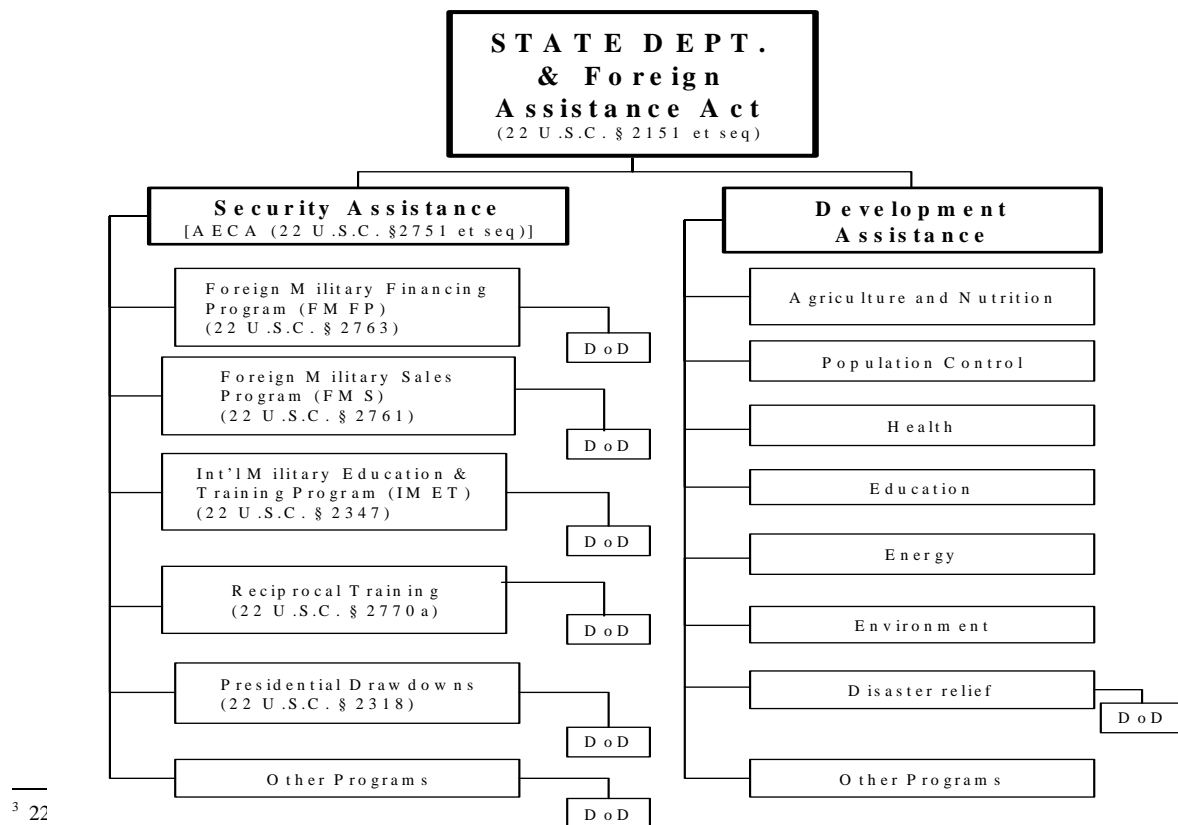
consumes a great amount of time and effort on the part of operational lawyers at all levels of command. Understanding the individual components of DoS's and DoD's foreign assistance programs is very important. The real challenge is to learn how the various programs interrelate with each other. This is where the JA earns credibility with the commander. By understanding the complex relationships between the various authorities and funding sources, the JA is better equipped to provide the commander with advice that can mean the difference between accomplishing the desired objective legally, accomplishing it with unnecessary legal and political risk, or not accomplishing it at all.

B. Legal Framework for Foreign Assistance.

1. The Foreign Assistance Act.

a. The Foreign Assistance Act of 1961 (FAA)³ constituted landmark legislation providing a key blueprint for a grand strategy of engagement with friendly nations. The FAA intended to support friendly foreign nations against communism on twin pillars:

- (1) Provide supplies, training, and equipment to friendly foreign militaries; and
- (2) Provide education, nutrition, agriculture, family planning, health care, environment, and other programs designed to alleviate the root causes of internal political unrest and poverty faced by the masses of many developing nations.
- (3) The first pillar is commonly referred to as "security assistance" and is embodied in Subchapter II of the FAA. The second pillar is generally known as "development assistance" and it is found in Subchapter I of the FAA.



³ 22

b. The FAA charged DoS with the responsibility to provide policy guidance and supervision for the programs created by the FAA. Each year Congress appropriates a specific amount of money to be used by agencies subordinate to the DoS to execute the FAA programs.⁴

c. As noted earlier, the FAA has two principal parts. Subchapter I provides for foreign assistance to developing nations; and Subchapter II provides for military or security assistance. The FAA treats these two aspects of U.S. government support to other countries very differently. The treatment is different because Congress is wary of allowing the U.S. to be an arms merchant to the world, but supports collective security. *See* 22 U.S.C. § 2301. The purposes served by the provision of defense articles and services under Part II of the FAA are essentially the same as those described for the Arms Export Control Act (*see* 22 U.S.C. § 2751), but under the FAA, the recipient is more likely to receive the defense articles or services free of charge.

d. Congress imposes fewer restraints on non-military support (foreign assistance) to developing countries. The primary purposes for providing foreign assistance under Subchapter I of the FAA are to alleviate poverty; promote self-sustaining economic growth; encourage civil and economic rights; and integrate developing countries into an open and equitable international economic system. *See* 22 U.S.C. §§ 2151, 2151-1. In addition to these broadly-defined purposes, the FAA contains numerous other specific authorizations for providing aid and assistance to foreign countries. *See* 22 U.S.C. §§ 2292-2292q (disaster relief); 22 U.S.C. § 2293 (development assistance for Sub-Saharan Africa).

e. Even though Congress charged DoS with the primary responsibility for the FAA programs, the U.S. military plays a very important and substantial supporting role in the execution of the FAA's first pillar, Security Assistance. The small DoD boxes attached to the primary Security Assistance programs in the above diagram represent this relationship. The U.S. military provides most of the training, education, supplies and equipment to friendly foreign militaries under Security Assistance authority. DoS retains ultimate strategic policy responsibility and funding authority for the program, but the "subcontractor" that actually performs the work is often the U.S. military. It should be noted that Congress requires by statute that both DoD and DoS conduct human rights vetting of any foreign recipient of any kind of training. *See e.g.* Sec. 8077, DoD Appropriations Act for FY 2005, Pub. L. No. 108-287 (2004).

f. With regard to the second pillar of the FAA, Development Assistance, USAID, the Office for Foreign Disaster Assistance (OFDA) within DoS, and embassies often call on the U.S. military to assist with disaster relief and other humanitarian activities. Again, the legal authority to conduct these programs emanates from the FAA, the funding flows from DoS's annual Foreign Operations Appropriations, and the policy supervision also rests DoS. But as represented by the above diagram, the U.S. military plays a relatively small role in DoS Development Assistance programs.

C. DoD Agencies that Participate in Providing Security Assistance:

1. Defense Security Cooperation Agency (DSCA). DSCA was created by DoD Directive 5105.65 as a separate defense agency under the direction, authority and control of the Assistant Secretary of Defense (International Security Affairs). Among other duties, DSCA is responsible for administering and supervising DoD security assistance planning and programs.

2. Defense Institute of Security Assistance Management (DISAM). DISAM is a schoolhouse operating under the guidance and direction of the Director, DSCA. According to DoD Directive 2140.5, the mission of DISAM is as follows: "The DISAM shall be a centralized DoD activity for the education and training of authorized U.S. and foreign personnel engaged in security assistance activities." In addition to resident courses, DISAM prepares a valuable publication entitled "The Management of Security Assistance," and the periodical "DISAM Journal." DISAM is located at Wright-Patterson AFB, Ohio.

3. The Military Departments.

⁴ Annual Foreign Operations Appropriations Acts.

a. Secretaries of the Military Departments. Advise the Secretary of Defense on all Security Assistance matters related to their Departments. Functions include conducting training and acquiring defense articles.

b. Department of the Army. Consolidates its plans and policy functions under the Deputy Undersecretary of the Army (International Affairs). Operational aspects are assigned to Army Materiel Command. The executive agent is the U.S. Army Security Assistance Command, Security Assistance Training Field Activity (SATFA) and Security Assistance Training Management Office (SATMO). These offices coordinate with force providers to provide mobile training teams (MTT) to conduct the requested training commonly referred to as a “train and equip” mission.

c. Department of the Navy. The principal organization is the Navy International Programs Office (Navy IPO). Detailed management occurs at the systems commands located in the Washington, D.C. area and the Naval Education and Training Security Assistance Field Activity in Pensacola, Florida.

d. Department of the Air Force. Office of the Secretary of the Air Force, Deputy Under Secretary for International Affairs (SAF/IA) performs central management and oversight functions. The Air Force Security Assistance Center oversees applicable FMS cases, while the Air Force Security Assistance Training Group (part of the Air Education Training Group) manages training cases.

e. Security Assistance Organizations (SAO). The term encompasses all DoD elements located in a foreign country with assigned responsibilities for carrying out security assistance management functions. It includes military missions, military groups, offices of defense cooperation, liaison groups, and designated defense attaché personnel. The primary functions of the SAO are logistics management, fiscal management, and contract administration of country security assistance programs. The Chief of the SAO answers to the Ambassador, the Commander of the Unified Command (who is the senior rater for efficiency and performance reports), and the Director, DSCA. The SAO should not be confused with the Defense Attachés who report to the Defense Intelligence Agency.

D. Security Assistance.

1. DoS’s Security Assistance Programs Under the Foreign Assistance Act (FAA) and Arms Export Control Act (AECA).

a. The DoD Dictionary of Military and Related Terms, Joint Publication 1-02, defines Security Assistance as: “Groups of programs authorized by the Foreign Assistance Act of 1961, as amended, and the Arms Export Control Act (AECA) of 1976,⁵ as amended, and other related statutes by which the United States provides defense articles, military training, and other defense related services, by grant, loan, credit or cash sales in furtherance of national policies and objectives.” The Policy of the program is threefold:

- (1) Promote peace and security through effective self-help and mutual aid;
- (2) Improve the ability of friendly countries and international organizations to deter, and defeat, aggression; and
- (3) Create an environment of security and stability in developing countries.

b. Funding for aid to foreign armies is specifically provided for in foreign assistance appropriations. Except as authorized under the acquisition and cross-servicing authority, the Arms Export Control Act regulates transfers of defense items and services to foreign countries. 22 U.S.C. §§ 2751-96. *See also* DoD 7000.14-R (Financial Management Regulation), vol. 15, Security Assistance Policy and Procedures (Aug. 9, 2004). Providing

⁵ 22 U.S.C. §§ 2751 et seq.. The purpose of the AECA was to consolidate and revise foreign relations legislation related to reimbursable military support. It is the statutory basis for the conduct of Foreign Military Sales and Foreign Military Construction Sales, and establishes certain export licensing controls on Direct Commercial Sales of defense articles and services.

weapons, training, supplies, and other services to foreign countries must be done under the Arms Export Control Act, the Foreign Assistance Act (FAA) (22 U.S.C. §§ 2151-2430i), and other laws.

c. The Arms Export Control Act.

(1) The Arms Export Control Act permits DoD and commercial sources to provide defense articles and defense services to foreign countries to enhance the internal security or legitimate self-defense needs of the recipient; permit the recipient to participate in regional or collective security arrangements; or permit the recipient to engage in nation-building efforts. 22 U.S.C. § 2754. Section 21(a)(1) of the Arms Export Control Act (22 U.S.C. § 2761(a)(1)) permits the sale of defense articles and services to eligible foreign countries. DoS appropriations and foreign countries' own revenues fund Arms Export Control Act activities. To sell defense articles and services (procured with DoD appropriations) to foreign countries, DoS first obtains them from the DoD. The Defense Security Cooperation Agency (DSCA) manages the process of procuring and transferring defense articles and services to foreign countries for the DoS. This process provides for reimbursement of applicable DoD accounts from DoS funds or from funds received from sales agreements directly with the foreign countries.

(2) The reimbursement standards for defense articles and services are established in Section 21(a)(1) of the Arms Export Control Act (22 U.S.C. § 2761(a)(1)). For defense articles the reimbursement standards are: not less than [the] actual value [of the article], or the estimated cost of replacement of the article, including the contract or production costs less any depreciation in the value of such article.

(3) For defense services the reimbursement standards are: [full cost] to the U.S. government of furnishing such service [unless the recipient is purchasing military training under the International Military Education and Training or IMET section the FAA, 22 U.S.C. § 2347] . . . [the value of services provided in addition to purchased IMET is recovered at] additional costs incurred by the U.S. Government in furnishing such assistance.

(4) Section 21(e) of the Arms Export Control Act (22 U.S.C. § 2761(e)) requires the recovery of DoD costs associated with its administrative services in conducting sales, plus certain nonrecurring costs and inventory expenses.

2. For the sake of discussion, the **DoS's Security Assistance programs are organized into three categories: appropriated programs, non-appropriated programs, and special programs.**

a. **Appropriated Programs.** These are programs for which Congress appropriates money in the annual Foreign Operations, Export Financing, and Related Programs Appropriations Act. *See* FY 05 Foreign Operations Appropriations Act (FOAA).⁶

(1) **Foreign Military Financing Program (FMFP).** Concept. Eligible governments or international organizations receive Congressionally-appropriated grants and loans to help them purchase U.S. defense articles, services, or training (or design and construction services) through Foreign Military Sales (FMS)/Foreign Military Construction (FMC) or Direct Commercial Sales (DCS) channels. Statutory Authority. AECA §§ 23-24 (22 U.S.C. §§ 2763-64). Governing Regulations. Security Assistance Management Manual (SAMM) (DoD 5105.38-M). Administering Agency. DoD, with provisions for consultation with DoS and Department of Treasury.

(2) **International Military Education and Training (IMET) Program.** Concept. Provide training to foreign military personnel in the United States, in overseas U.S. military facilities, and in participating countries on a grant basis. The "Expanded IMET Program" focuses on civilian control of the military, military justice systems, codes of conduct, and protection of human rights, and permits training of influential non-Ministry of Defense civilian personnel. Statutory Authority. FAA §§ 541-45 (22 U.S.C. §§ 2347-47d). Governing Regulations. AR 12-15; SAMM, at ch. 10. Administering Agency. DoD. The Defense Security Cooperation Agency (DSCA)

⁶ Consolidated Appropriations Act, 2005, div. D, Pub. L. No. 108-447, (2005). (hereinafter, 2005 FOAA). The Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2005 (HR 4818) was consolidated as Division D of the final enacted Consolidated Appropriations Act for FY 05.

has overall responsibility within DoD for implementing IMET. The Defense Institute for International Studies (DIIS), located at the Naval Justice School, coordinates all IMETs involving legal education or training.

(3) **Economic Support Fund (ESF).** Concept. In special economic, political or security circumstances, make loans or grants to eligible foreign countries for a variety of economic purposes, including balance of payments support, infrastructure and other capital and technical assistance development projects, and health, education, agriculture, and family planning. Statutory Authority. FAA §§ 531-35 (22 U.S.C. §§ 2346-46d). Administering Agency. DoS, to be exercised in cooperation with the Director of the United States International Development Cooperation Agency and USAID.

(4) **Peacekeeping Operations (PKO).** Concept. Provide funds for the Multinational Force and Observers (MFO) implementing the 1979 Egyptian-Israeli peace treaty, for the U.S. contribution to the United Nations Force in Cyprus (UNFICYP), and for other international peace enforcement and peacekeeping operations. Statutory Authority. FAA §§ 551-53 (22 U.S.C. §§ 2348-48c). Administering Agency: DoS.

(5) **Non-proliferation, Antiterrorism, De-Mining, and Related Programs (NADR).** Concept. Captures several related programs in a single account, including non-proliferation and disarmament fund, which is designed to halt the proliferation of nuclear, biological, and chemical weapons; destroy or neutralize existing weapons of mass destruction; and limit the spread of advanced conventional weapons. 22 U.S.C. §§ 5851-61, codifying the Freedom for Russia and Emerging Eurasian Democracies and Open Markets [FREEDOM] Support Act of 1992, Pub. L. No. 102-511, §§ 501-511, 106 Stat. 3320 (1992).

(6) **International Atomic Energy Agency support.** The IAEA is primarily responsible for overseeing safeguard agreements concluded under the Non-Proliferation Treaty of 1968. FAA § 301 (22 U.S.C. § 2221).

(7) **Korean Peninsula Energy Development Organization (KEDO).** Established in 1994 to arrange for financing and construction of light water nuclear reactors for North Korea, with the shipment of fuel oil in the interim, in exchange for North Korea's dismantling of its nuclear weapons program. FAA § 301 (22 U.S.C. § 2221).

(8) **Anti-Terrorism Assistance,** which provides specialized training to foreign governments to help increase their capability and readiness to deal with terrorists and terrorist incidents. FAA § 571-(22 U.S.C. § 2349aa).

(9) **Global Humanitarian De-Mining,** which provides funds that are devoted to identifying and clearing land mines. AECA § 23 (22 U.S.C. § 2763).

(10) **Refugee Assistance (22 U.S.C. 2601c).** DoS is responsible for refugee support in the Migration and Refugee Assistance Act of 1962. *See* FY05 FOAA (\$770 million appropriated to DoS to support refugee operations, the International Organization for Migration (IOM), the International Committee of the Red Cross (ICRC) and the United Nations High Commissioner for Refugees (UNHCR); as well as \$30 million of no-year money to support the Emergency Refugee and Migration Assistance Fund). (*See also* provisions of the Refugee Assistance Act of 1980, § 501 (8 U.S.C. § 1522 note), authorizing the President to direct other agencies to support Cuban and Haitian Refugees on a reimbursable or non-reimbursable basis).

b. **Non-Appropriated Programs.** These programs authorize certain activities. Because they do not require Congressional funding, there is no annual appropriation for their implementation.

(1) **Foreign Military Sales (FMS) Program and Foreign Military Construction (FMC) Program.** Concept. Eligible recipient governments or international organizations purchase defense articles, services, or training (or design and construction services), often using grants provided under the Foreign Military Financing program discussed above, from the United States government on the basis of formal contracts or agreements (normally documented on a Letter of Offer and Acceptance (LOA) and managed by DoD as "cases") with contractors who are part of DoD's network of defense industry contractors. The articles or services come either

from DoD stocks or new procurements under DoD-managed contracts. FMS cases must be managed at no cost to the U.S. Government. Recipient countries are charged an administrative surcharge to pay for the costs of administering the program, including most personnel costs. Statutory Authority. AECA §§ 2122 (22 U.S.C. §§ 2761-62) (authorizing FMS); AECA § 29 (22 U.S.C. § 2769) (authorizing FMC). Governing Regulations. SAMM. Administering Agency. DoD.

(2) **Direct Commercial Sales (DCS).** Concept. Eligible governments or international organizations purchase defense articles or services under a DoS-issued license directly from U.S. industry, often using grants provided under the Foreign Military Financing program discussed above. No management of the sale by DoD occurs (unlike FMS). Statutory Authority. AECA § 38 (22 U.S.C. § 2778). Governing Regulations. 22 C.F.R. §§ 120-30 (comprising chapter entitled “International Traffic in Arms Regulations (ITAR)). The SAMM, at 202-6 - 202-14, includes a reprint of the United States Munitions List (USML). The USML is a list containing items considered “defense articles” and “defense services” pursuant to AECA §§ 38 and 47(7) that are therefore strictly controlled. Administering Agency. DoS, Department of Commerce, Department of Treasury.

(3) **Reciprocal Training, 22 U.S.C. § 2770a.** When conducted in accordance with a bilateral international agreement, U.S. military units may train and support foreign units (*e.g.*, at combat training centers) provided that the foreign country reciprocates with equivalent value training within one year.⁷ If the foreign country has not reciprocated, they are expected to pay for the value of the training received. Because Congress does not appropriate funds specifically for reciprocal training, the U.S. military unit conducting the training will incur the cost or it may want to seek funding from other sources such as the Combatant Commander Initiative Funds.

c. Special Programs.

(1) **Excess Defense Articles (EDA) Provisions.** Concept. EDA are essentially defense articles no longer needed by the U.S. armed forces.⁸ There is a general preference to provide EDA to friendly countries whenever possible rather than having them procure new items. Only countries that are justified in the annual Congressional Presentation Document (CPD) by the DoS or separately justified in the FOAA during a fiscal year are eligible to receive EDA. EDA must be drawn from existing stocks. Congress requires 15 days notice prior to issuance of a letter of offer if the USG sells EDA. However, most EDA is transferred on a grant basis. No DoD procurement funds may be expended in connection with an EDA transfer. The transfer of these items must not adversely impact U.S. military readiness. EDA are priced on the basis of their condition, with pricing ranging from 5 to 50 percent of the items original value. The sale/grant of EDA must include an agreement for the recipient country to pay the costs of packing, crating, handling, and transportation (PCH&T). On an exceptional basis, the President may provide transportation (on a space available basis), in accordance with FAA § 516(e) (22 U.S.C. § 2321j(e)). Finally, the annual value of EDA is limited to \$425 million of the articles’ current value. FAA § 516(g)(1) (22 U.S.C. § 2321j(g)(1)). Governing Regulations. SAMM, chapter 11. Administering Agency. DSCA.

(2) Emergency Presidential Drawdown Authorities.

⁷ The bilateral international agreement must be negotiated and concluded by an element of DoD with appropriate authority as outlined in DoD Directive 5530.3, International Agreements, 11 June 1987, Ch1, 18 Feb 1991, and AR 550-51, International Agreements, 15 April 1998. The bilateral international agreement is not merely a handshake and a promise between two commanders, one U.S. and one foreign military, neither of whom may have the requisite authority legally to bind their respective governments.

⁸ Section 644(g), FAA, defines Excess Defense Articles:

“Excess defense articles means the quantity of defense articles (other than construction equipment, including tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators, and compressors) owned by the United States government, and not procured in anticipation of military assistance or sales requirements, or pursuant to a military assistance or sales order, which is in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all Department of Defense Components at the time such articles are dropped from inventory by the supplying agency for delivery to countries or international organizations under this Act [Section 9(b), P.L. 102-583]

The National Defense Authorization Act of FY 1993 amended Title 10, U.S.C. by adding a new Section 2562 which restricts the sale or transfer of excess construction or fire equipment. Such transfers or military sales may only occur if either of the following conditions apply: 1) no department/agency of the U.S. government (excluding DoD), and no State, and no other person or entity eligible to receive excess or surplus property submits a request for such equipment from the Defense Reutilization and Marketing Service (DRMS) during the period for which such a request may be accepted by the DRMS; or 2) the President determines that such a transfer is necessary in order to respond to an emergency for which the equipment is especially suited [Section 4304(a), P.L. 102-484].

(i) **What it is.** The emergency presidential drawdown authority of 22 U.S.C. § 2318 authorizes the President to direct DoD support for various DoS efforts that further national security, including counterdrug programs (22 U.S.C. § 2318(a)(2)(A)(i)).⁹ In addition, Part VIII of subchapter I (in Part I of the FAA) is the International Narcotics Control provision of the act (22 U.S.C. §§ 2291-2291k). The DoS writes the appropriate presidential determination. After signature by the President, DoD, specifically DSCA, administers the drawdown, up to the specified dollar value. The Presidential drawdown authority merely provides authority to spend previously appropriated money, Service O&M, to provide training, services, packing, crating, and handling services, transportation services, repair/refurbishment services, and the provision of spare parts or support services from the Working Capital Fund operated by the Defense Logistics Agency activities. There is no specific appropriation tied to the initiation of a Presidential drawdown, although a dollar figure is always given. Because the drawdown is not a planned or budgeted activity, there is an immediate impact on the Service's O&M budget when executing a drawdown. Bottom line: a drawdown is only useful to a military unit if it is already established and provides a possible authority, not funding, if no other more specific authority exists, for a unit to conduct a particular mission with its own funds.¹⁰

- Since 1992, over 50 drawdowns have been executed at a value of \$1.5 billion.

Drawdowns appear to be an easy solution to achieve a DoS mission with DoD articles and services, but drawdowns often take time to establish and execute, anywhere from two to four months or ten to twelve depending on the mission.

- A drawdown of DoD resources may be reimbursed by a subsequent appropriation (22 U.S.C. § 2318(c)); however, this seldom occurs. Recently, DoD has been reimbursed twice under the Emergency Wartime Supplemental Appropriation Act, 2003, 16 April 03, for an Iraq Drawdown of \$97 million (DoD has been reimbursed \$63.5 million) and an Afghanistan drawdown of \$300 million (to provide defense articles and services, counternarcotics, crime control and police training services, military education and training and other support through 30 Sep 2006) (thus far, DoD has been reimbursed \$165million).¹¹ When no subsequent appropriation is forthcoming, a Presidential drawdown is another example of an authorized augmentation of accounts (DoD appropriations are used to achieve an objective ordinarily funded from DoS appropriations).

(ii) **What is it NOT.** A drawdown is not authority to give away excess defense articles and services. As noted above, there are no funds appropriated specifically for a drawdown unless appropriated after the fact and tied to reimbursement. In 1995, the DoD General Counsel issued an opinion that DoD may not enter into any new contracts under the drawdown authority for either defense articles or services. The one exception is that contracts for commercial airlift and sealift transportation may be entered into if the cost is less than the cost of military transport.¹² This exception was formalized in Section 576, P.L. 105-118 that amended the FAA to provide

⁹ The Defense Security Cooperation Agency has proponency for Drawdowns. See <http://www.dsca.osd.mil/>. For a good "nuts & bolts" guide to drawdowns see, DSCA Action Officer (AO) Handbook for Foreign Assistance Act (FAA) Drawdown of Defense Articles and Services, (June 2004), available at: http://www.dsca.mil/programs/biz-ops/drawdown_handbook_2004b.pdf.

¹⁰ For example, the Foreign Operations Appropriations Act, 2003, authorizes the drawdown of commodities and services up to \$30 million for the U.N. War Crimes Tribunal with regard to the former Yugoslavia or such other tribunals (ICTR) as the U.N. Security Council may establish or authorize to deal with violations of the law of war. In Bosnia and Kosovo when the Chief Prosecutor for ICTY, Mrs. Carla Della Ponte, comes into the area of operations and requires support, this drawdown would authorize such support. Frequently, units have provided her with special protection as part of their training because she falls into a category of personnel authorized such special protection, a person of special interest. JAs need to be aware that any costs accrued beyond the costs of normal training could be accounted for under this drawdown and reimbursement might subsequently be forthcoming. As yet, DoS has not received an appropriation from Congress to reimburse such costs even though the drawdown authority has been renewed annually for a number of years.

¹¹ Under this authority, DoD is able to reimburse the Services for a drawdown of \$165M under the Afghanistan Freedom Support Act (AFSA) of 2002 (4 Dec. 2002). This drawdown was necessary to cover the requirements for training and equipping the Afghan National Army (ANA)(\$150M); to build a bridge between Tajikistan and Afghanistan (\$8M); and to assist Jordan in its operations in Afghanistan (\$7M). Under AFSA, the military services reduced their training and exercise accounts as a means for DoD to complete these missions. The \$165M are used to restore funds drawn down from the Services' FY2003 Operation and Maintenance appropriations in the amount of \$35M from the Army, \$75M from the Navy, and \$55M from the Air Force. Similarly, this Supplemental also authorized the reimbursement funding from DoD to the Services for \$63.5M under the Iraq Liberation Act of 1998. This support was necessary to meet the requirements to train and equip the Free Iraqi Forces (FIF). The \$63.5M is used to restore funds drawn from the Services' FY2003 O&M in the amount of \$29M from the Army, \$11M from the Navy, \$23.4M from the Air Force, and \$0.1M from the FY2003 Operation and Maintenance, Defense-Wide appropriations (required for the Special Operations Command).

¹² Memorandum, Office of the General Counsel, Department of Defense, Subject: Contracting for Commercial Airlift and Sealift Pursuant to a Presidential Drawdown of Transportation Services, 4 Dec. 1995.

the authority for the use of commercial transportation and related services acquired by contract for the drawdown if the contracted services cost less than the cost of using U.S. government transportation assets. As of November 2002, DoD General Counsel modified its earlier opinion to allow for the contracting of services as well as commercial transport, but not articles, under the drawdown authority.¹³

(iii) Types of Presidential Emergency Drawdown Authorities.

- **Military Emergencies:** FAA § 506(a)(1) (22 U.S.C. § 2318(a)(1)). The President may draw down defense articles, defense services, and military education and training if an unforeseen emergency arises that requires immediate military assistance that cannot be met under any other section. The authority is limited to \$100 million per fiscal year.

- **Other Emergencies:** FAA § 506(a)(2) (22 U.S.C. § 2318(a)(2)). If the President determines that it is in the United States' national interest to drawdown to support counternarcotics, disaster relief, refugee and migration assistance, antiterrorism, and non-proliferation assistance, he may draw down articles and services from the inventory and resources of any agency of the U.S. and military education and training from DoD. Certain restrictions apply. The aggregate value of articles, services, and military education and training cannot exceed \$200 million in any fiscal year. Not more than \$75M may be provided from the inventory and resources of DoD. Not more than \$75 million may be provided for international narcotics control assistance. Not more than \$15M may be provided to support DoD-sponsored humanitarian projects associated with POW/MIA recovery operations in Vietnam, Cambodia, and Laos.

- **Peacekeeping Emergencies:** FAA § 552(c) (22 U.S.C. § 2348a(c)). With respect to peacekeeping operations, the President has emergency authority to transfer funds if he determines that, as the result of an unforeseen emergency, it is in our national interests to provide assistance. He may also direct the drawdown of commodities and services from the inventory and resources of any U.S. Government agency of an aggregate value not to exceed \$25 million in any fiscal year.

NOTE: Recipients for all three types of drawdown can be either a foreign country or an international organization.

3. Prohibitions and Potential Legal Issues.

a. **General.** Congress appropriates funds for Security Assistance in its annual Foreign Operations, Export Financing, and Related Programs Appropriations Act. Security Assistance funds are often referred to as "Title 22 money" after the authorizing U.S. Code provisions. DoD receives its money under a separate appropriation ("Title 10 money"). General principles of fiscal law restrict the expenditure of funds to the purpose for which those funds were appropriated. **Critical for JAs to remember: activities, programs and operations which are essentially Security Assistance, and which should therefore be funded with DoS Title 22 money, may not be funded with DoD Title 10 money.**

b. **Unauthorized Training of Foreign Personnel.** Congressional Purpose. Training of foreign military forces should occur through the IMET, an FMS case, or some other specifically authorized program. Security Assistance programs that furnish training must not be supported by appropriations intended to be used for the operation and maintenance of United States forces. (Remember the 1984 and 1986 GAO Honduras opinions.) The law defines "training" very broadly: "[T]raining includes formal or informal instruction of foreign students in the United States or overseas by officers or employees of the United States, contract technicians, or contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice to foreign military units and forces." AECA § 47(5) (22 U.S.C. § 2794(5)). The FAA § 644 (22 U.S.C. § 2403) contains a substantially similar definition, though "training exercises" is omitted.

¹³ Memorandum, Office of the General Counsel, Department of Defense, Subject: Implementation of "Drawdown" Authority Under Iraq Liberation Act, 21 Nov. 2002. Although the subject line appears to focus on drawdown authority under one act, the language of the memorandum makes it clear that contracting for services applies to all Presidential Drawdowns not just those relating to Iraq.

(1) **Not all activity that appears to be training of foreign personnel is considered to be security assistance training.**

(i) Providing foreign armed forces with **interoperability, safety, and familiarization information** is not security assistance training. “[M]inor amounts of interoperability and safety instruction [do] not constitute “training” as that term is used in the context of security assistance, and could therefore be financed with O&M appropriations.” *The Honorable Bill Alexander, House of Representatives*, B-213137, Jan. 30, 1986 (unpublished GAO opinion).

(ii) Additionally, if **the primary purpose of the exercise or activity is to train U.S. troops**, then the activity is not considered to be security assistance training of foreign forces. “In our view, a U.S. military training exercise does not constitute “security assistance: as long as (1) the benefit to the host government is incidental and minor and is not comparable to that ordinarily provided as security assistance and (2) the clear primary purpose of the exercise is to train U.S. troops.” *Gen. Fred F. Woerner*, B-230214, Oct. 27, 1988.

(2) The FAA also contains **special prohibitions concerning the training of foreign police**. No FAA funds “shall be used to provide training or advice, or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government or any program of internal intelligence or surveillance on behalf of any foreign government within the United States or abroad.” FAA § 660(a) (22 U.S.C. § 2420(a)). **Exemptions.** FAA § 660(b) exempts from the general prohibition “assistance, including training, relating to sanction monitoring and enforcement,” and “assistance provided to reconstitute civilian police authority and capability in the post-conflict restoration of host nation infrastructure for the purposes of supporting a nation emerging from instability, and the provision of professional public safety training, to include training in internationally recognized standards of human rights, the rule of law, anti-corruption, and the promotion of civilian police roles that support democracy.”

(3) The general prohibition also does not apply to longtime democracies with no standing armed forces and with good human rights records.

c. **Unauthorized Defense Services of a Combatant Nature.** “Personnel performing defense services sold under this chapter may not perform any duties of a combatant nature, including any duties related to training and advising that may engage United States personnel in combat activities, outside the United States in connection with the performance of those defense services.” AECA § 21(c)(1) (22 U.S.C. § 2761(c)(1)).

d. **Eligibility Problems With the Foreign Country.**

(1) Consistently violate internationally-recognized human rights. FAA § 502(B) and FY 05 FOAA, § 551.

(2) Expropriation of Property Owned by U.S. Citizens. FAA § 620(e)(1) (22 U.S.C. § 2370(e)(1)).

(3) Involvement in Nuclear Transactions. FAA § 669-70 (22 U.S.C. § 2429-29a).

(4) In Arrears on Debts. FAA § 620(q) (22 U.S.C. § 2370(q)).

(5) Support to Prevent International Terrorism. FAA § 620A (22 U.S.C. § 2371) and AECA § 40 (22 U.S.C. § 2780).

(6) Transfer, Failing to Secure, or Use of Defense Articles, Services, or Training for Unintended Purposes. FAA § 505 (22 U.S.C. § 2314). (End Use Agreement)

(7) Has by military coup or decree deposed its duly elected Head of Government. FY 05 FOAA, § 508. Pursuant to Section 1(b)(1) of the Pakistan Waiver Act, P.L. 107-57, 27 Oct. 2001, Presidential Determination 2003-16, dated 14 March 2003, waives this prohibition for furnishing assistance to Pakistan.

(8) Congress requires special notification to Congress before obligating funds for Liberia, Zimbabwe, Serbia, Sudan, Pakistan, or Cambodia. FY 05 FOAA, § 520.

e. **Restriction on providing Military Assistance to States who have signed and ratified the Rome Statute of the International Criminal Court (ICC).** The American Service Members Protection Act, 2002, § 2007, prohibits “military assistance” to states that are a party to the Rome Statute.¹⁴ This provision became effective July 2003. The ASPA defines “military assistance” exclusively in terms of Title 22 authorities such as foreign military financing (FMF), IMET, and EDA. It does not apply to Title 10 authorities such as Combatant Commander Initiative Funds, Humanitarian and Civic Assistance funds, and Latin American Cooperation funds. Applicability. This prohibition does not apply to the government of a NATO member country; a non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, Bahrain, and New Zealand); and Taiwan. All others who are a party to the Rome Statute must either enter into an Article 98 agreement¹⁵ or be given a National Interest Waiver by the President.

f. **Weapons-Specific Prohibitions.**

(1) Tank Ammunition. Sales of depleted uranium tank rounds are limited to countries that are NATO members, Taiwan, and countries designated as a major non-NATO ally. FAA, § 620G (22 U.S.C. § 2378a).

(2) Stingers. Congress continued the annual provision prohibiting making available Stingers to any country bordering the Persian Gulf (Iraq, Iran, Kuwait, Saudi Arabia, Qatar, United Arab Emirates, and Oman), except Bahrain. Bahrain may buy Stingers on a one-for-one replacement basis. FOAA 2000 § 705.

(3) For the restrictions on certain transfers see the SAMM, in particular for white phosphorus munitions, *see* para. C.4.3.7, for napalm, *see* para. C.4.4.4, and for RCA *see* para. C.4.4.5.

4. **Interagency Funding Issues.**

a. The overall tension in the FAA between achieving national security through mutual military security, and achieving it by encouraging democratic traditions and open markets, is also reflected in the interagency transaction authorities of the act. *Compare* 22 U.S.C. § 2392(c) *with* 22 U.S.C. § 2392(d) (discussed below)). DoD support of the military assistance goals of the FAA is generally accomplished on a full cost recovery basis; DoD support of the foreign assistance and humanitarian assistance goals of the FAA is accomplished on a flexible cost recovery basis.

b. By authorizing flexibility in the amount of funds recovered for some DoD assistance under the FAA, Congress permits some contribution from one agency’s appropriations to another agency’s appropriations. That is, an authorized augmentation of accounts occurs whenever Congress authorizes recovery of less than the full cost of goods or services provided.

c. DoS reimbursements for DoD or other agencies’ efforts under the FAA are governed by 22 U.S.C. § 2392(d). Except under emergency Presidential drawdown authority (22 U.S.C. § 2318), reimbursement to any government agency supporting DoS objectives under “subchapter II of this chapter” (Part II of the FAA (military or security assistance)) is computed as follows:

[a]n amount equal to the value [as defined in the act] of the defense articles or of the defense services [salaries of military personnel excepted], or other assistance furnished, plus expenses arising from or incident to operations under [Part II] [salaries of military personnel and certain other costs excepted].

¹⁴ 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Title II, § 2001-2015, P.L. 107-206, 2 August 2002 [Hereinafter American Service Members Protection Act].

¹⁵ An Article 98 agreement is an agreement entered into pursuant to Article 98 of the Rome Statute of the ICC. Article 98 provides that the ICC may not proceed with a request for surrender [of an individual(s)], which would require the requested state to act inconsistently with its obligations under international agreements.

d. This reimbursement standard is essentially the “full reimbursement” standard of the Economy Act. Pursuant to FAA § 632 (22 U.S.C. § 2392) DoS may provide funds to other executive departments to assist DoS in accomplishing its assigned missions (usually implemented through “632 Agreements” between DoD and DoS). Procedures for determining the value of articles and services provided as security assistance under the Arms Export Control Act and the FAA are described in the Security Assistance Management Manual (DoD Manual 5105.38-M) and the references therein.

e. In addition to the above, Congress has authorized another form of DoD contribution to the DoS’s counterdrug activities by providing that when DoD furnishes services in support of this program, it is reimbursed only for its “additional costs” in providing the services (*i.e.*, its costs over and above its normal operating costs), not its full costs.

f. The flexible standard of reimbursement under the FAA mentioned above for efforts under Part I of the FAA is described in 22 U.S.C. § 2392(c). This standard is applicable when any other Federal agency supports DoS foreign assistance (not military or security assistance) objectives for developing countries under the FAA.

[A]ny commodity, service, or facility procured . . . to carry out subchapter I of this chapter [Part I] [foreign assistance] . . . shall be (reimbursed) at replacement cost, or, if required by law, at actual cost, or, in the case of services procured from the DoD to carry out part VIII of subchapter I of this chapter [International Narcotics Control, 22 U.S.C. § 2291(a)-2291(h)], the amount of the additional costs incurred by the DoD in providing such services, or at any other price authorized by law and agreed to by the owning or disposing agency.

g. Note the specific reference to DoD services in support of DoS counterdrug activities. “Additional costs incurred” is the lowest acceptable interagency reimbursement standard. If Congress wishes to authorize more DoD contribution (that is, less reimbursement to DoD appropriations), Congress authorizes the actual expenditure of DoD funds for or on the behalf of other agencies. *See* Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 1001-11, 104 Stat. 1485, 1628-34 (1990) [codified at 10 U.S.C. § 374 note] (providing general authority for DoD to engage in counterdrug operations); *see also* Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1021, 112 Stat. 2120 (1998) (section 1021 of the Defense Authorization Act for FY 04, Pub. L. No. 108-136, extends DoD’s counterdrug authority through 30 September 2006).

h. The DoD reimbursement standards for 22 U.S.C. § 2392(c) are implemented by DoD 7000.14-R, vol. 11A (Reimbursable Operations, Policies and Procedures), ch. 1 (General), ch. 7 (International Narcotics Control Program). When DoD provides services in support of DoS counterdrug activities, the regulation permits “no cost” recovery when the services are incidental to DoD missions requirements. The regulation also authorizes pro rata and other cost sharing arrangements. *See* DoD 7000.14-R, vol. 11A, ch. 7.

i. Emergency authorities also exist to permit the U.S. to provide essential assistance to foreign countries when in the interest of U.S. security. *See, e.g.*, 22 U.S.C. § 2364 (President may authorize assistance without regard to other limitations if he determines it will assist U.S. security interests, and notifies Congress; certain limitations still apply).

5. Summary of Security Assistance. The key point to remember about Security Assistance is that the DoS provides the overall policy guidance even though U.S. military agencies administer many of the individual programs. Security assistance is a foreign policy tool employed by the Administration and Congress, and thus programs, funding, and eligible recipients will frequently change as political realities change. Security Assistance must be funded with DoS’s Annual Foreign Operations Appropriations commonly referred to as Title 22 money. Finally, as is evident from the discussion above, the U.S. military plays a role in administering the various security assistance programs. The baseline rule is that although DoD may be authorized to conduct an activity under Title 22, it may not use Title 10 money to fund its role in these programs. If, however, it does expend Title 10 funds or resources, then it should seek reimbursement from DoS under the appropriate authority in the form of Title 22 money or the annual Foreign Operations Appropriations Act (FOAA).

E. Development Assistance Programs.

1. This section will provide a very brief description of the DoS's Developmental Assistance programs, as depicted in the second pillar of the diagram at Section VIII.B.1.a.3. Although the U.S. military has a relatively minor and infrequent role in most of these programs, it plays a key role in the provision of Foreign Disaster Relief. Again, the legal authority to conduct these programs emanates from the FAA, funding flows from the DoS's annual Foreign Operations Appropriations, and the policy supervision also rests with DoS.

2. **General.** The DoS supervises and conducts a large number of activities authorized by Part I of the FAA designed to strengthen the socio-economic well being of the civilian population. There are too many activities to list them all, but a partial list of the primary programs will provide the reader with a flavor for the wide range of objectives envisioned by this legislation. The activities under the Development Assistance program include, but are not limited to:

Agriculture	Trade credit	Overseas Private Investment Corp.
Rural development	Endangered species	Disadvantaged children in Asia
Nutrition	Shale development	Famine prevention
Population control & health	Tropical forests	Disaster Assistance
Education	Human rights	International Narcotics Control
Energy	Housing guarantees	Loan guarantees
Cooperatives	Central America Democracy, Peace & Development	
Integration of women into the economy		Protection of the environment & natural resources
Economic & Democratic Development for the Independent States of the Former Soviet Union		

3. **Military Role.** The military's role in the provision of development assistance through the FAA is relatively limited when compared to its role in the provision of security assistance. Nevertheless, from time to time, agencies charged with the primary responsibility to carry out activities under this authority, call upon the U.S. military to render assistance. An example of participation by the U.S. military would be action taken in response to a request for disaster assistance from the **Office for Foreign Disaster Assistance (OFDA)**. OFDA often asks the U.S. military for help in responding to natural and man-made disasters overseas. Key point: generally, costs incurred by the U.S. military pursuant to performing missions requested by other Federal agencies under the FAA, Development Assistance provisions, must be reimbursed to the military pursuant to FAA § 632 or pursuant to an order under the Economy Act.

4. Foreign Disaster Relief In Support of OFDA.

a. The United States has a long and distinguished history of aiding other nations suffering from natural or manmade disasters. In fact, the very first appropriation to assist a foreign government was for disaster relief.¹⁶ The current statutory authority continuing this tradition is located in the Foreign Assistance Act.¹⁷ For foreign disaster assistance, Congress granted the President fiscal authority to furnish relief aid to any country "on such terms

¹⁶ This appropriation was for \$50,000 to aid Venezuelan earthquake victims in 1812. Over 25,000 people died in that tragedy. Act of 8 May 1812, 12th Cong., 1st Sess., ch. 79, 2 Stat. 730.

¹⁷ FAA § 492 (10 U.S.C. § 2292) (International Disaster Assistance). The President may furnish foreign disaster assistance under such terms and conditions determined appropriate pursuant to the FAA §§ 491-496 (22 U.S.C. §§ 2292-2292q). See Foreign Operations Appropriations Act for FY 03, Pub. L. 108-7, (2003) (\$230M appropriated to DoS for international disaster assistance under this authority).

Additionally, Congressional policy is espoused in 22 U.S.C. § 2292(a) as follows:

The Congress, recognizing that prompt United States assistance to alleviate human suffering caused by natural and manmade disasters is an important expression of the humanitarian concern and tradition of the people of the United States, affirms the willingness of the United States to provide assistance for the relief, and rehabilitation of people and countries affected by such disasters.

and conditions as he may determine.”¹⁸ The President’s primary implementing tool in carrying out this mandate is USAID.

b. The USAID is the primary response agency for the U.S. government to any international disaster.¹⁹ Given this fact, DoD traditionally has possessed limited authority to engage in disaster assistance support. In the realm of Foreign Disaster Assistance, the primary source of funds should be the International Disaster Assistance Funds.²⁰ The Administrator of the USAID controls these funds because the President has designated that person as the Special Coordinator for International Disaster Assistance.²¹ In addition, the President has designated USAID as the lead agency in coordinating the U.S. response for foreign disaster.²² Normally these funds support NGO and PVO efforts in the disaster area. However, certain disasters can overwhelm NGO and PVO capabilities, or the military possesses unique skills and equipment to accomplish the needed assistance. In these situations, DoS, through OFDA, may ask for DoD assistance. Funding in these cases comes from the International Disaster Assistance fund controlled by OFDA. DoD is supposed to receive full reimbursement from OFDA when they make such a request. DoD access to these funds to perform Disaster Assistance missions occurs pursuant to § 632 FAA.

c. Natural or manmade disasters have increasingly become the basis for military operations. The object of foreign disaster relief operations is to provide sufficient food, water, clothing, shelter, medical care, and other life support to victims of natural and man-made disasters. To accomplish this objective, the military may be tasked to establish a secure operational environment and begin to support PVO/NGO supply, medical, and transportation systems. Recent examples of such operations include SEA ANGEL in Bangladesh, SUPPORT HOPE in Rwanda, RESTORE HOPE in Somalia, PROVIDE COMFORT in Northern Iraq, and STRONG SUPPORT in response to Hurricane Mitch in Central America.²³ OPERATION STRONG SUPPORT was funded not only with International Disaster Assistance fund dollars (Title 22) but also with Overseas Humanitarian, Disaster, and Civic Aid appropriations (OHDACA) dollars (FY99 DoD expended \$50 million in OHDACA on this operation. Title 22 funds are often used conjunctively with Title 10 funds. The specific nature and limitations of Title 10 authorities and funds will be discussed below. In addition, foreign disaster relief operations may coexist with other operations, and arise in unexpected contexts. For example, in September 1994, the U.S. Ambassador to Haiti declared that the “corruption and repression in the *de facto* regime” had caused a man-made state of disaster in that country. The declaration opened the door for additional relief, rehabilitation, and reconstruction assistance (and funds) for Haiti.

5. **Summary.** As reflected in the foregoing discussion, DoD’s role is one of support to DoS in accomplishing its foreign assistance goals. There are however, specific Title 10 authorities that allow DoD to execute certain programs and operations independently, though still complementing and supplementing DoS’s global humanitarian assistance efforts. These specific authorities are detailed in the next sections.

IX. DOD’S MILITARY COOPERATIVE PROGRAMS AND HUMANITARIAN OPERATIONS

A. In addition to its substantial support role in the administration of Security Assistance programs, the U.S. military executes several cooperative programs and humanitarian operations funded with Title 10 DoD O&M money. The majority of these cooperative programs and humanitarian operations are statutorily based. The cooperative programs are organized into three categories: training foreign forces, logistic support to foreign forces, and contacts and cooperation with foreign militaries. The humanitarian operations include Humanitarian and Civic Assistance (HCA), Humanitarian DeMining (HD), Transportation of Relief Supplies, Provision of Excess Defense Equipment, and Humanitarian Assistance (HA). Both types of authorities are depicted on the diagram below.

¹⁸ 22 U.S.C. § 2292(b).

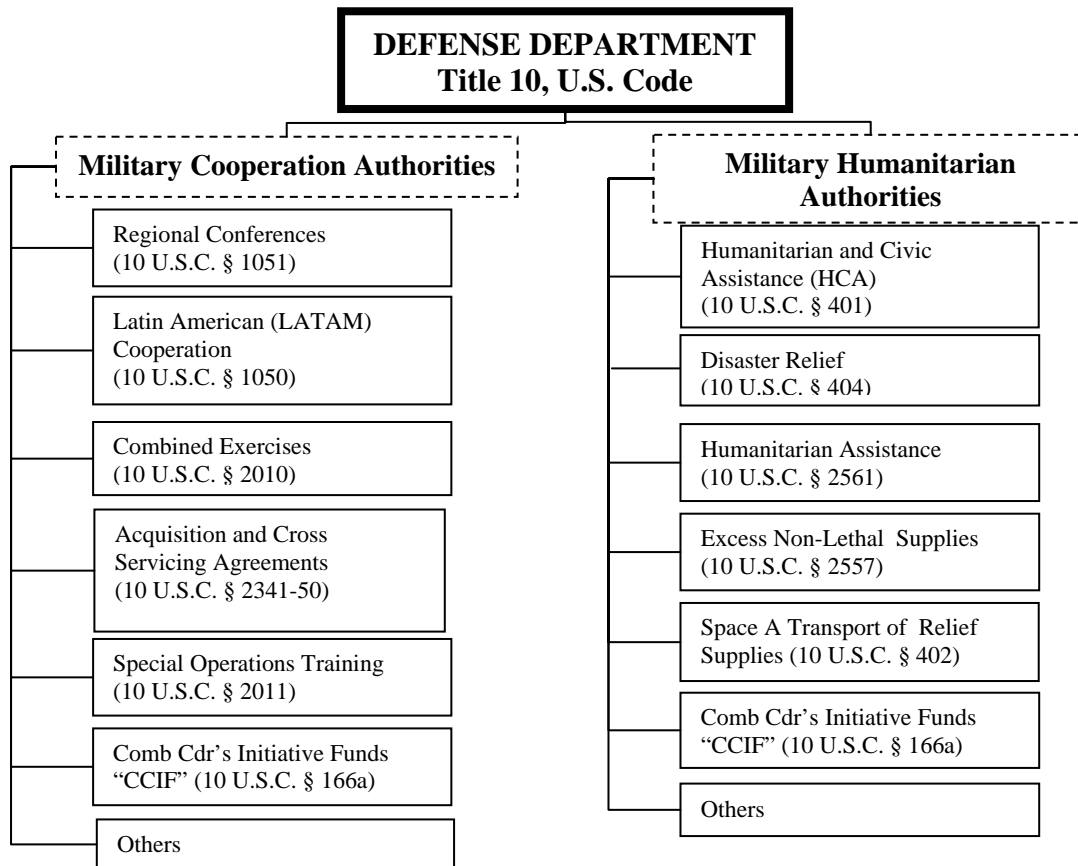
¹⁹ E.O. 12966, 60 F.R. 36949 (July 14, 1995).

²⁰ FAA §§ 491 - 495K, 22 U.S.C. §§ 2292 - 2292q.

²¹ See FAA § 493, 22 U.S.C. § 2292b and E.O. 12966, Sec. 3, 60 F.R. 36949 (July 14, 1995). See also E.O. 12163, section 1-102(a)(1), 44 F.R. 56673 (Sept. 29, 1979), *reprinted as amended in* 22 U.S.C.A. § 2381 (West Supp. 1996).

²² See generally, E.O. 12966, 60 F.R. 36949 (July 14, 1995).

²³ Operations Sea Angel and Strong Support were traditional Foreign Disaster Relief Operations where the effected Governments requested U.S. assistance. Operations Support Hope, Restore Hope, Provide Comfort presented additional challenges because they were largely non-permissive in nature. In the cases of the last three examples, the United Nations essentially conducted a humanitarian intervention.



B. Military Cooperative Programs.

1. Training Foreign Forces.

a. As noted in Part VIII, the primary authority for training foreign forces is Title 22 as part of Security Assistance. There exist, however, additional statutory authorities under Title 10 and GAO interpretations allowing for training to be authorized and funded using O&M rather than using DoS appropriations. The two GAO interpretation exceptions are interoperability, safety, and familiarization training and training that primarily benefits the U.S. and provides foreign forces only an incidental benefit. These have been addressed previously in Section VIII.D. 3.b.1) of this Chapter.

b. The specific Title 10 provisions authorizing **training of foreign forces** are:

(1) Special Operations Forces, 10 U.S.C. § 2011 Provided that the training primarily benefits U.S. special operations forces, SOF may train, and train with, friendly foreign forces. U.S. forces may pay incremental expenses incurred by friendly developing countries as the direct result of such training. U.S. Special Operations Command has interpreted this authority to mean that the training must occur overseas.

(2) Combatant Commander Initiative Funds, 10 U.S.C. § 166a. The Chairman, JCS, provides funds to Combatant Commanders for a wide variety of purposes, including military education and training of foreign forces. No more than \$10 million may be expended for this training per fiscal year worldwide. This fund, referred to as CCIF money, operates essentially as a contingency fund that permits the Combatant Commander to pay for initiatives. The CCIF money provides the Combatant Commander with flexibility to cover expenses that, for one reason or another, cannot be covered by the designated pot of money.

(3) Acquisition and Cross-Servicing Agreements (ACSA), 10 U.S.C. §2341-2350. Training services may be provided using an ACSA. *See* 10 U.S.C. § 2350 for the definition of logistical support, supplies, and services, and paragraph 2 below for additional information on ACSAs.

(4) Emergency and Extraordinary Expense (EEE) Funds, 10 U.S.C. § 127. *See* Part VII.B.2 above for additional information on the use of EEE funds for training foreign forces.

c. **“Train & Equip” authority.** In section 1107 of the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. 108-106 (6 November 2003), Congress authorized SECDEF, with the concurrence of SECSTATE, to use \$150 million O&M to train and equip the new Iraqi Armed Force and the Afghan National Army. This authority is in addition to any other authority to provide assistance to foreign nations. Section 9006 of the FY05 Defense Appropriations Act, Pub. L. No. 108-287 continued this authority for FY 05 with increased authority to use \$500 million of Defense-Wide O&M.

2. Logistics Support for Foreign Militaries.

a. **Acquisition and Cross-Servicing Agreements (ACSA), 10 U.S.C. §§ 2341–2350.** DoD has authority to acquire logistic support without resort to commercial contracting procedures and to transfer support to foreign militaries outside of the AECA. Under the statutes, after consulting with DoS, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis. Foreign militaries often prefer this method of obtaining logistical support because they do not have to pay the administrative fees associated with sales under the Foreign Military Sales program, and it is quicker and often more flexible.

(1) The present ACSA authorities have their origins in the North Atlantic Treaty Organization (NATO) Mutual Support Act of 1979 (NMSA), which was originally enacted on 4 August 1980 (P.L. 96-323). Before passage of this legislation, U.S. forces acquired and transferred logistic support through highly formalized means. Logistic support, supplies and services were acquired from foreign governments through commercial contracting methods and application of U.S. domestic procurement laws and regulations (*i.e.*, offshore procurement agreements). Allied requests for logistic support from U.S. forces could only be processed as Foreign Military Sales (FMS) cases under the Arms Export Control Act (AECA). Reductions in the numbers of U.S. logistics forces stationed in the European theater caused greater reliance on host nation support. Allied government sovereignty concerns resulted in refusal to accept U.S. commercial contracting methods. Application of FMS procedures to allied requests for routine logistic support caused additional friction. Finally, DoD turned to Congress for legislative relief.

(2) Through passage of the NMSA, Congress granted DoD a special, simplified authority to acquire logistic support, supplies, and services without the need to resort to traditional commercial contracting procedures. In addition, the NMSA also authorized DoD, after consultation with the DoS, to enter into cross-servicing agreements with our NATO allies and with NATO subsidiary body organizations for the reciprocal provision of logistic support. In so doing, Congress granted DoD a second acquisition authority as well as the authority to transfer logistic support outside of AECA channels.

b. **“Lift & Sustain” Authority.** In section 1106 of the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. 108-106 (6 November 2003), Congress gives DoD authority to use the O&M appropriated for FY 2004 to provide supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Iraq. As a result, DoD need not rely on an ACSA to provide assistance to its allies, but has great flexibility in mission accomplishment to use its O&M funds. Section 9009 of the FY05 Defense Appropriations Act, Pub. L. No. 108-287 (2004) continued this authority for FY 05 and also included operations in Afghanistan.

c. **“Key Cooperating Nations” Authority.** Through the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. 108-106 (6 November 2003),

Congress provided \$1.15 billion of Defense-Wide O&M to remain available until expended to reimburse Pakistan, Jordan, and other key cooperating nations for logistical and military support provided to U.S. military operations in connection with military action in Iraq and the global war on terrorism.

3. **Military Contact and Cooperative Authorities.**

a. Congress has provided ample authority for bilateral and multilateral contacts with foreign militaries. These authorities are the heart of the current Partnership for Peace (PFP) program, as well as many other joint training, military-to-military contact, and exercise programs. These authorities fund U.S. costs of preparing and conducting combined training, as well as paying selected incremental costs for our training partners. All of these activities are funded with O&M funds.

b. **Bilateral and Multilateral Contacts.**

(1) **10 U.S.C. § 1050 (Latin American Cooperation - LATAM COOP)** authorizes service secretaries to pay the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses the secretaries consider necessary for Latin American cooperation.

(2) **10 U.S.C. § 1051 (Bilateral or Regional Cooperation Programs)** provides similar authority to pay travel expenses and other costs associated with attendance at bilateral or regional conferences, seminars, or similar meetings if the SECDEF deems attendance in the U.S. national security interest. The National Defense Authorization Act, 2003, § 1212, amends this provision by adding authority to pay the travel expenses of defense personnel, from a developing country that is participating in the PFP program of the North Atlantic Treaty Organization (NATO), to the territory of any country participating in the PFP program or the territory of any NATO member country. *See also* DoD Authorization Act for FY 97, Pub. L. No. 104-201 (110 Stat. 3009), § 1065 and § 8121 (1996), authorizing support for participation in Marshall Center activities for European and Eurasian nations, and attendance by foreign military officers and civilians at seminars and similar studies at the Asia-Pacific Center for Security Studies, respectively.

(3) **10 U.S.C. § 168 (Military-to-Military Contacts)** authorizes the SECDEF to engage in military-to-military contacts and comparable activities that are designed to encourage democratic orientation of defense establishments and military forces of other countries.

(4) **10 U.S.C. § 1051a (Administrative support and services for coalition liaison officers)** provides DoD authority to provide administrative services and support for the performance of duties by a foreign liaison officer involved in a coalition while the liaison officer is assigned temporarily to the headquarters of a combatant command, component command, or subordinate operational command of the United States in connection with the planning for or conduct of a coalition operation.²⁴ Under this authority DoD may also pay the travel, subsistence, and personal expenses directly necessary to carry out the duties of a liaison officer of a developing country in connection with assignment to the headquarters of a combatant command, if the assignment is requested by the combatant commander. Based on a determination of SECDEF, these services and support may be provided either with or without reimbursement.

(5) **5 U.S.C. § 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412 (Travel).** Travel to conferences and site visits is supported with a variety of statutory authorities.²⁵ U.S. civilian employees and military personnel are authorized to expend U.S. funds under the Joint Travel Regulations (JTR), para. C.6000.3; individuals performing services for the government may also be funded.

c. **Bilateral and Multilateral Exercise Programs.**

²⁴ Section 1211 of The National Defense Authorization Act, 2003, adding § 169, defines “administrative services and support” as “base or installation support services, office space, utilities, copying services, fire and police protection, and computer support.” It also defines “coalition” as “an adhoc arrangement between or among the United States and one or more other nations for common action.”

²⁵ 31 U.S.C. § 1345 requires a specific appropriation for travel, transportation, and subsistence expenses for meetings. *See also* National Highway Traffic Safety Admin.—Travel and Lodging Expenses, 62 Comp. Gen. 531 (1983).

(1) **10 U.S.C. § 2010 (Developing Country Exercise Program - DCCEP)** authorizes payment of incremental expenses of a developing country incurred during bilateral or multilateral exercises if it enhances U.S. security interests and is essential to achieving the fundamental objectives of the exercise.

(2) **10 U.S.C. § 2011 (Special Operations Force - SOF Training)** permits the SOCOM Commander or Combatant Commander to fund the expenses of training all Special Operations Forces [Civil Affairs, PSYOP, Special Forces, SEALs, Rangers, Special Boat Units, AFSOC, etc.] training with the armed forces or security forces of a friendly developing foreign country, including incremental expenses.

(3) **Incremental expenses** incurred as the result of these training authorities include rations, fuel, training aids, ammunition, and transportation; they do not include pay, allowances, and other normal costs for the country's personnel.

d. Regional Cooperation Programs, Education and Training.

(1) **Partnership for Peace** activities are authorized by existing authorities, outlined above.²⁶

(2) **Cooperative Threat Reduction (CTR) with States of the Former Soviet Union (FSU).** This legislation funds various programs to dismantle the FSU's arsenal of weapons of mass destruction;²⁷ Congress appropriated \$450.8 million for the CTR program in FY 2004.²⁸ These are three-year funds available until 30 September 2006.

C. DoD's Military Humanitarian Operations.

1. Predicate: The 1984 and 1986 GAO Honduras Opinions and their impact on the evolution of Military Humanitarian Operations.

a. Historically, DoD conducted limited Humanitarian and Civic Assistance (HCA) operations in foreign nations without separate statutory authority.²⁹ In 1984, the Comptroller General opined that DoD's extensive use of O&M funds to provide HCA violated the Purpose Statute (31 U.S.C. § 1301(a)) and other well-established fiscal principles. *See To The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (1984) (Honduras I). The Comptroller General concluded that DoD had used its O&M accounts improperly to fund foreign aid and security assistance. The *Honduras I* opinion applied a three-pronged test to determine whether certain expenses for construction and to provide medical and veterinary care were proper expenditures:

First and foremost, the expenditure must be reasonably related to the purposes for which the appropriation was made Second, the expenditure must not be prohibited by law Finally, the expenditure must not fall specifically within the scope of some other category of appropriations. *Honduras I* at 427-28.

b. This test is used to analyze fiscal law problems. Applying it to the military construction, training, and HCA operations conducted in Honduras in 1983, the Comptroller General disapproved certain O&M expenditures that were reasonably related to DoD purposes (that is, expenditures which achieved "readiness and operational benefit" for DoD), but which failed the other tests. The Comptroller General determined that certain O&M expenditures were improper either because they were prohibited by law (violating the second prong of the above test), or because they achieved objectives that were within the scope of more specific appropriations, such as

²⁶ See H.R. Conf. Rep. No. 747, 103d Cong., 2d Sess. 63 (1994)

²⁷ National Defense Authorization Act for FY 99, Pub. L. No. 105-261, 112 Stat. 2161, § 1301 (1998). *But see* Defense Authorization Act, § 1303 (prohibiting use of funds for peacekeeping or peacekeeping-related activity, housing, environmental restoration, or job training).

²⁸ Defense Appropriations Act for FY 2004, Pub. L. No. 108-87, 117 Stat. 1054 (2003).

²⁹ In the early 1980's, the U.S. government tasked DoD to provide military assistance to the Nicaraguan "contra" rebels who were committed to overthrow the Sandanistas (then ruling Communist party of Nicaragua). The U.S. military conducted operations out of Soto Cano Airbase in Honduras. As part of its mission, U.S. forces conducted joint and combined exercises with the Honduran Army. During these exercises the U.S. military conducted a wide range of construction, and humanitarian and civic assistance programs using O&M funds.

appropriations to DoS for foreign aid under the FAA or the Arms Export Control Act (violating the third prong). See The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.) (Honduras II) at 27-30. The Comptroller General did recognize, however, that limited HCA was permissible with O&M funds. See Honduras II at 38. See also 10 U.S.C. § 401c(4) and DoD Dir. 2205.2, Humanitarian and Civic Assistance. This controversy spurred the development of separate legislative authority (discussed below) for the conduct of humanitarian activities by the military.

c. GAO concluded its opinion by “recommending to DoD that it seek specific funding authorization from the Congress if it wishes to continue performing such a wide variety of activities under the aegis of an O&M funded exercise.” DoD wasted no time in acting on GAO’s recommendation. Within a few years following the 1984 Honduras Opinion, DoD sought and obtained several legislative authorizations permitting the use of DoD O&M funds to conduct limited operations and activities that benefit foreign nations. These operations and activities are very similar to those conducted by DoS agencies pursuant to the FAA. The key to these DoD authorized activities is that they must complement, supplement, and support the primary FAA programs, but should not, duplicate, or frustrate the FAA programs. The right column of the diagram at the beginning of Section IX lists some of the principal DoD legislative authorities that permit the U.S. military to conduct operations that complement DoS’s Security Assistance and Development Assistance programs.

d. To ensure that the DoD operations and activities complement but do not duplicate or frustrate DoS foreign assistance and development assistance programs, the DoD authorizing legislation usually:

- (1) Limits the funding levels to relatively small amounts;
- (2) Requires coordination and approval by the DoS and U.S. embassy in the target nation; and
- (3) Requires reporting of activities to Congress.

e. Before discussing the military programs, however, we should understand the policy underlying these programs, and possible trade-offs involved. Why is DoD involved in what looks like DoS business that is not directly related to national security? Many civilian policy makers and military commanders argue that there exists a nexus between providing basic human needs and national security. They believe that: (1) nations that fail to provide basic human needs often fail to maintain the support of their citizens; (2) insurgencies thrive in areas where the government can not or will not provide basic services; and (3) the provision of humanitarian assistance by the U.S. forces helps teach the proper role of the military in a democracy to developing countries. U.S. forces providing humanitarian services to the civilian population demonstrate to host nation forces that the military serves the civilian population.

f. The U.S. military also benefits from its participation in humanitarian activities. Such activities include: (1) provide a method for introducing U.S. forces in areas where they may not otherwise have access; (2) reduce the number of permanent forward deployed troops; and (3) provide training opportunities that are impossible to duplicate in the U.S.

2. Title 10 U.S. Code, Legislative Authorities: Military Humanitarian Operations.

a. **Humanitarian and Civic Assistance (HCA), 10 U.S.C. § 401.** The enactment of HCA legislation is a direct Congressional response to the 1984 GAO Honduras Opinion. Congress recognized the benefits of permitting U.S. armed forces to conduct limited HCA projects.

(1) The typical sequence for the initiation and execution of HCA projects is as follows. The embassy country teams and the service components of the regional Combatant Commanders nominate HCA projects for their respective countries to the Combatant Commander having responsibility for that country. That commander, usually at an annual HCA conference, then develops an order of merit list. Proposed HCA projects that fall below the funding “cut line” may not be completed because the funds were unavailable. HCA funding comes directly from the Services to the Combatant Commanders. The money is Service O&M funds that are fenced off by the Services

specifically for HCA. Each service is responsible for funding a particular Combatant Command (*e.g.*, Army: SOUTHCOM & EUCOM).

(2) Congress imposed certain restrictions on the conduct of HCA by the U.S. military. The DoS must approve all HCA projects. The security interests of both the U.S. and the receiving nation must be promoted. The mission must serve the basic economic and social needs of the people involved. HCA must complement but not duplicate any other form of social or economic assistance. The aid may not be provided to any individual, group or organization engaged in military or paramilitary activity. HCA must be conducted in conjunction with an exercise to include CJCS-directed, or a deployment for training (DFT), or an ongoing military operation. The HCA activity being conducted must promote specific operational readiness skills of the individual soldier.

(3) HCA funds are used to pay for expenses incurred as a “direct result” of the HCA activity. These expenses include the following: consumable materials, equipment leasing, supplies, and necessary services. Pursuant to DoDD 2205.2, *Humanitarian and Civic Assistance*, expenses as a “direct result” do not include costs associated with the military operations, *which likely would have been incurred whether or not the HCA was provided*, such as: transportation, military personnel, petroleum oil and lubricants, and repair of U.S. government equipment. HCA expenditures are reported each year to Congress by country, type and amount.

(4) The statute lists four kinds of activities that may be performed as traditional HCA:

- (i) Medical, dental, and veterinary care provided in rural or underserved areas of a country.
- (ii) Construction of rudimentary surface transportation systems.
- (iii) Well drilling and construction of basic sanitation facilities.
- (iv) Rudimentary construction and repair of public facilities.

(5) Legal issues that typically arise during the conduct of HCA projects include the following:

(i) Furnishing and equipping newly constructed buildings. Engineer units that complete a construction project desire to leave behind a “turn-key” facility that is ready to be used. Blackboards, in practice, have been considered a fixture and therefore would be authorized under this authority. HCA authority, however, does not authorize the purchase of medical equipment for installing in a new building designed to be a clinic, nor does it authorize the purchase of school desks, or other movable personal property, and books to be placed in a building designed to be a schoolhouse. The JA could suggest alternative funding sources for the desired equipment. For example, USAID may have funds available to equip the new building. DoD may have excess non-lethal equipment it can transfer through USAID to the host nation. Private and non-governmental organizations often have funds or equipment available that could be used to furnish the building. Finally, U.S. military personnel, on a truly volunteer basis and on their personal time, could use scrap pieces of lumber to build desks, blackboards, etc., to furnish a building.

(ii) Donation of unused materials, supplies and minor equipment. Sometime the U.S. military unit may wish to leave behind small tools or excess construction materials or medical supplies that were not consumed during the HCA project. As a general rule, the U.S. military cannot leave tools, supplies or materials behind with the local authorities. The problem with leaving these items behind with the local authorities is that once the unit leaves, there is no longer a nexus to training. Leaving these items behind (in significant quantities) amounts to foreign aid that should be funded with DoS Title 22 funds under the FAA. If there were no way to economically or practically save the items for a follow-on HCA exercise, then they could be declared excess and disposed of through the normal procedures. Ultimately, USAID would take possession of the items and distribute them to the local authorities. Remember: USAID is authorized to provide Developmental Assistance to foreign governments; military units are not and thus cannot provide the items directly to the local authorities.

(iii) Promotion of operational readiness skills. The issue that arises more frequently than any other is whether or not the specific operational readiness skills of the members of the unit participating are being

promoted by the HCA project. The promotion of these skills is a statutory requirement. The JA should ask: are the skills being utilized during the HCA project within the unit's METL? What is the ratio of U.S. participation relative to foreign military participation? Are they relying too heavily on foreign civilian contractor participation? DoDD 2205.2 provides additional guidance in this regard.

(6) ***De minimis* HCA.** Sometimes, during the course of a combined exercise in a foreign country, an unexpected opportunity to perform minor humanitarian and civic assistance arises. For example, during the conduct of an infantry platoon level combined exercise, a young girl in the local village near the exercise site may require minor medical attention to set a broken bone. 10 U.S.C. § 401(c)(2) authorizes the military commander to permit the treatment of the child by the platoon's assigned doctor or medic. The costs associated with this treatment would likely be minimal and would be paid for from the unit's O&M funds. This kind of activity is referred to as *de minimis* HCA. Only HCA amounting to "minimal expenditures" may be provided. Although minimal expenditures are not defined in the statutes, DoD Directive 2205.2 provides guidance in determining what minimal means.³⁰ Remember that *de minimis* HCA activities must be one of the four activities statutorily allowed as an HCA activity. (e.g. medical/dental care or rudimentary construction). Additionally, all of the other restrictions for the conduct of HCA mentioned above apply to *de minimis* HCA as well.

b. De-Mining. Title 10 U.S. Code § 401(e)(5).

(1) The HCA statute also provides for activities relating to the furnishing of education, training, and technical assistance with respect to the detection and clearance of landmines. This activity is contained within the HCA statute, but it is not restricted by the rules pertaining to traditional HCA. In fact, many of the rules pertaining to de-mining are completely contrary to those pertaining to traditional HCA. Thus, for purposes of our discussion, it is more logically consistent to categorize § 401 de-mining as a separate kind of activity rather than associating it with traditional HCA. Additionally, § 401 de-mining is funded differently than HCA. It is funded with OHACA, not fenced or budgeted O&M.

(2) **Rules.** U.S. forces are not to engage in the physical detection, lifting, or destroying of landmines (unless it is part of a concurrent military operation other than HCA). Unlike traditional HCA activities, assistance with regard to de-mining must be provided to military or armed forces. Unlike HCA, equipment, services and supplies acquired for de-mining, including non-lethal, individual, or small-team landmine clearing equipment or supplies may be transferred to the foreign country (limit of \$5M value worldwide annually). Additionally, U.S. forces training de-mining can enter into contracts for interpreters, supplies and other items necessary to execute this mission.

c. Humanitarian Assistance, 10 U.S.C. § 2561. Authorizes use of funds for transportation of humanitarian relief and for other humanitarian purposes worldwide. This authority is often used to transport U.S. Government donated goods to a country in need. (10 U.S.C. § 402 applies when relief supplies are supplied by non-governmental and private voluntary organizations, *see* below.) "Other humanitarian purposes worldwide" is not defined in the statute. Generally, if the contemplated activity falls within the parameters of HCA under 10 U.S.C. § 401, then the more specific HCA authority should be used. 10 U.S.C. § 2561 primarily allows more flexibility in emergency situations such as disasters, natural or man-made and it allows contracts if necessary for mission execution. HCA generally requires pre-planned activities and must promote operational readiness skills of the U.S. participants. Section 2561 does not require the promotion of operational readiness skills of the U.S. military participants. Also, unlike HCA, which must be conducted in conjunction with an exercise or on-going military operation, humanitarian assistance (HA) can be conducted as a stand-alone project. Section 312 of the FY 2004 National Defense Authorization Act amends 10 U.S.C. § 2561 to allow SECDEF to use this authority to transport supplies intended for use to respond to, or mitigate the effects of, an event or condition that threatens serious harm to the environment (such as an oil spill) if other sources of transportation are not readily available. The SECDEF may require reimbursement for the costs incurred by DoD to transport such supplies. JAs must obtain and review for

³⁰ See "Definitions" where DoD explains that a commander is to use reasonable judgment in light of the overall cost of the operation in which the expenditure is incurred, taking into account the amount of time involved and considering congressional intent. DoD then gives two examples of De Minimis. (1) A unit's doctor examining villagers for a few hours, administering several shots and issuing some medicine but not a deployment of a medical team providing mass inoculations. (2) Opening an access road through trees and underbrush for several hundred yards, but not asphaltting a roadway.

implementation purposes the DoD message on current guidance for Humanitarian Assistance Activities. Each fiscal year the Office of the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict (SO/LIC) and the Defense Security Cooperation Agency (DSCA) issue a joint message providing policy guidance for humanitarian assistance activities. *See* Message, R251658Z Feb 2004, Secretary of Defense, subject: Policy and Program Guidance for FY05 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities and Humanitarian and Civic Assistance (HCA).

d. **Excess non-lethal supplies: humanitarian relief, 10 U.S.C. § 2557.** Sometimes the provision of troops and transportation alone is not enough. This statute allows DoD to provide excess non-lethal supplies for humanitarian relief. Excess property may include any property except: real property, weapons, ammunition, and any other equipment or material that is designed to inflict bodily harm or death. Excess property is that property which is in the Defense Reutilization and Marketing Office (DRMO) channels. If the required property is in the excess property inventory, it is transferred to USAID, as agent for the DoS, for distribution to the target nation. This statute does not contain the authority to transport the items, though it may be provided under authority of 10 U.S.C. § 2561, above.

e. **Transportation of humanitarian relief supplies to foreign countries, 10 U.S.C. § 402.** This statute authorizes the transportation of non-governmental, privately donated relief supplies. It is administered by DoS and DSCA. The relief supplies are transported on a space-available basis under certain conditions: (1) supplies must be in useable condition; (2) supplies must be suitable for humanitarian purposes, and (3) adequate arrangements must have been made for their distribution in country. Once in-country, the supplies may be distributed by any U.S. government agency, a foreign government agency, an international organization, or a private nonprofit organization. DoD may not use this authority to supply a military or paramilitary group. In light of the fact that the supplies are transported on a space-available basis, no separate funding is necessary. However, reports must be submitted to Congress. Administrative details for the use of the § 402 authority may be found at: <http://www.dentonfunded.com/>. Section 312 of the FY 2004 National Defense Authorization Act amends 10 U.S.C. § 402 to allow SECDEF to use this authority to transport supplies intended for use to respond to, or mitigate the effects of, an event or condition that threatens serious harm to the environment if other sources of transportation are not readily available. The SECDEF may require reimbursement for the costs incurred by DoD to transport supplies for such purposes.

f. **Foreign Disaster Assistance, 10 U.S.C. § 404.** In consultation with the Secretary of State, USAID is the lead agency for foreign disaster relief, with the primary source of funding being the International Disaster Assistance Funds, 22 U.S.C. § 2292-2292k. DoD has limited authority to engage in disaster assistance. The President may direct DoD through the Secretary of Defense to respond to manmade or natural disasters. The President delegated disaster relief authority to SECDEF with concurrence of DoS (except in emergency situations). *See* EO 12966, 60 Fed. Reg. 36949 (15 July 1995). DoD's participation must be necessary to "save lives." Assistance may include: transportation, supplies, services, and equipment. The President must notify Congress within 48 hours after the commencement of the assistance. The notice must include: The manmade or natural disaster involved, the threat to human lives presented, the U.S. military personnel and material resources involved or expected to be involved, disaster relief being provided by other nations or organizations, and the expected duration of the assistance activities. Section 312 of the FY 2004 National Defense Authorization Act amends 10 U.S.C. § 404 to allow SECDEF to use this authority to provide transportation services in response to man-made or natural disasters to prevent serious harm to the environment even when human lives are not at risk, so long as other sources of transportation are not readily available. The SECDEF may require reimbursement for the costs incurred by DoD to transport supplies for such purposes. 10 U.S.C. § 404 is rarely used because there is no implementing guidance. As a result, DoD relies on the broad authority of 10 U.S.C. § 2561 to conduct the foreign disaster assistance contemplated under 10 U.S.C. § 404.

g. **Combatant Commander (formerly CINC) Initiative Funds, 10 U.S.C. § 166a.** This authority provides the combatant commanders with a great deal of legal flexibility to conduct humanitarian operations and activities. The statute specifically lists "Humanitarian and civil assistance" as an authorized activity.

3. Funding sources for Military Humanitarian Operations:

a. **Fenced or Budgeted O&M** used to pay for 10 U.S.C. §401 HCA activities other than de-mining. *De minimus* HCA activities are funded generally with the unit's O&M funds. Specifically, the unit will use resources that it has available (*i.e.* use of the military personnel; supplies and other materials).

b. **Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA).** In an attempt to bring some order to the scattered authorities and funding sources for military humanitarian programs, Congress began appropriating funds into an account labeled "Overseas Humanitarian, Disaster, and Civic Assistance" (OHDACA) account. OHDACA funds are generally used to pay for operations and activities which are authorized by Title 10 § 2561, Humanitarian Assistance, and De-Mining under 10 U.S.C. § 401. Even though the law specifically lists HCA and Disaster Relief as appropriate uses for the fund, the actual practice is that OHDACA funds are used to pay for § 2561 authorized activities.

4. **New Paradigm in Humanitarian Assistance – The Commander's Emergency Response Program (CERP).**

a. **Background.** The CERP was developed in June 2003 by the Coalition Provisional Authority in Iraq to enable commanders to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility.³¹ The CERP was originally funded exclusively with seized assets. The CERP was also funded with Iraqi oil sales proceeds and donor nation contributions referred to as the Development Fund for Iraq or DFI. Approval authority for CERP expenditures was pushed down to the division and brigade-level commanders, who were given specific spending ceilings. Thousands of projects were undertaken in the first few months of the program, and the streamlined payment procedures of the CERP made such humanitarian projects swift and efficient. *See* CJTF-7 FRAGO 89.

b. **Reconstruction assistance** is the "building, repair, reconstruction, and reestablishment of the social and material infrastructure in Iraq." *See* FRAGO 89. Examples of reconstruction assistance noted in FRAGO 89 are: financial management improvements, restoration of the rule of law and governance initiatives, day laborers for civic cleaning projects, and purchase or repair of civic support vehicles.

c. **Appropriated Funds for CERP.** Because of the turnover of governing functions to the interim Iraqi government and the disestablishment of the CPA in June 2004, coalition forces no longer have access to seized Iraqi assets nor the Development Fund for Iraq (DFI). Continuing the reported benefits of the CERP projects, Congress has recently provided appropriated funds for the CERP.

(1) Sec. 1110, FY04 Emergency Supplemental Appropriations Act (ESAA) provided \$180 million of appropriated funds.

(2) Sec. 9007, FY05 DoD Appropriations Act provides \$300 million of appropriated funds.

d. **CERP Appropriated Funds Purpose.** "[Enable] military commanders in Iraq [and Afghanistan] to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi [and Afghan] people." Congress also exempted the CERP from normal statutory fiscal and contracting controls by allowing the appropriated funds to "be used, notwithstanding any other provision of law." *See*, FY04 ESAA and the FY05 DoD Appropriations Act. *See also*, MNF-I FRAGO 087, 291401DJUN04 for command guidance on the use of appropriated funded CERP.

e. **MNF-I FRAGO 087.** To regulate this fairly liberal appropriation from Congress, the U.S. military commands within Iraq and Afghanistan have provided controls and other procedures to ensure proper use of CERP funds. Multi-National Force – Iraq (MNF-I) is currently the military command over all U.S. and coalition forces within Iraq and has issued a series of orders concerning proper use and accountability of CERP funds. Fragmentary Order 087 (FRAGO 087) is the most recent primary order issued by MNF-I that regulates the CERP "to allow

³¹ *See* Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., February 2004 (advocating continued disciplined use of appropriated CERP funds by commanders to pursue urgent humanitarian relief and reconstruction efforts in Iraq and Afghanistan).

commanders to respond to urgent humanitarian relief and reconstruction assistance by executing programs that will assist the Iraqi people.”

(1) CERP Projects - Paragraph 3.B. of FRAGO 087 lists fairly broad examples of projects, to include: “water and sanitation infrastructure; food production and distribution; agriculture; electrical power generation and distribution; healthcare; education; telecommunications; economic, financial, management improvements; transportation; rule of law and governance; irrigation; civic clean-up activities; civic support vehicles; [and] repair to civic or cultural facilities.”

(2) Battle Damage Claims - CERP appropriated funds may be used to repair collateral damage to individual homes and businesses caused by combat operations that are not otherwise compensable because of combat exclusions under the Foreign Claims Act. *See* 3.B.1.B.2 of MNF-I FRAGO 318.

(3) Solatia Like Payments – CERP appropriated funds may be used for condolence payments as a means of expressing sympathy and are not considered as an admission of fault by the U.S. Government. Maximum payments are \$2500 for a death, \$1000 for a serious injury, and \$500 for property loss or damage. *See* 3.B.1.B.3 of MNF-I FRAGO 318.

(4) Rewards and Weapons Buy-Back Programs – CERP appropriated funds may not be used to pay rewards or fund any type of weapon buy-back program. *See* 3.C.8.D. and 3.C.8.G. of MNF-I FRAGO 087. However, reward payments are authorized under 10 USC §127b and implemented in Iraq through CJTF-7 FRAGO 368 to CJTF-7 OPOD 03-036.

f. MNF-I FRAGO 087 Accountability Controls. To provide accountability for CERP funded projects, FRAGO 087 establishes certain controls. For example, FRAGO 087 provides:

(1) Commanders are not authorized to deliberately over-pay for projects.

(2) Document every effort to verify reasonableness of project costs.

(3) For projects over \$10,000, the brigade or division commander should ensure that three bids are obtained from vendors. If you are precluded from obtaining three quotes or bids based on compelling circumstances, this must be documented.

(4) Project limits are \$200,000 for Brigade/O-6 Commanders and \$500,000 for Division Commanders. However, subsequent revisions have deleted the \$200,000 Brigade Commander limit and allow Division Commanders discretion in establishing Brigade Commander limits within the Division Commander overall limits.

g. New DoD Guidance for CERP. The new guidance primarily assigns administration responsibilities, defines proper CERP projects, and specifies accountability procedures. Specific CERP projects were not changed in any great detail from prior guidance established through FRAGOs. *See* Memorandum, Tina W. Jonas, Under Secretary of Defense Comptroller, to Secretaries of the Military Departments, et al, subject: Commander’s Emergency Response Program (CERP) Guidance (18 Feb 2005). This guidance will be incorporated into the Financial Management Regulation DoD 7000.14-R.

h. JA Focus. The CERPs in Iraq and Afghanistan are administered using detailed accounting and reporting procedures that are distinct from normal financial management and government acquisition regulation. JAs should proactively review FRAGOs and DoD guidance for proper CERP uses and controls.

X. SUPPORTING MULTILATERAL PEACE AND HUMANITARIAN OPERATIONS

A. U.S. support to other nations or international organizations during multilateral operations is authorized by a number of provisions of the Foreign Assistance Act, Title 10 U.S.C., the Arms Export Control Act, and other statutes. With respect to UN support, Presidential Decision Directive (PDD)-25 emphasizes the necessity for

reducing costs for UN peace operations, reforming UN management of peace operations, and improving U.S. management and funding of peace operations (including increased cooperation between the Legislative and Executive branches). The United States generally will seek either direct reimbursement for the provision of goods and services to other nations or international organizations, or credit against a UN assessment. In rare circumstances, the United States may contribute goods, services, and funds on a nonreimbursable basis. DoS is responsible for oversight and management of Chapter VI operations where U.S. combat units are not participating, as well as Chapter VI operations in which U.S. forces are participating and all Chapter VII operations.

B. Authorities. Much like Disaster Relief and Refugee Support, DoS has the lead in supporting other nations engaged in Peacekeeping Operations (PKO). *See* FAA § 551 (22 U.S.C. § 2348). *See also* Foreign Operations Appropriations Act for FY 2003 (additional appropriations), P.L. 108-7, (2003) (DoS provided \$114.25M to support PKO). Other than the authorities mentioned below, DoD is prohibited from providing direct or indirect contributions to the UN for peacekeeping operations or to pay UN arrearages under 10 U.S.C. § 405. In addition, under § 8064 of the Defense Appropriations Act for FY 2005, P. L. 108-287 (2004), DoD also must notify Congress 15 days before transferring to another nation or international organization any defense articles or services in connection with peace operations under Chapter VI or VII of the UN Charter or any other international peacekeeping, peace enforcement, or humanitarian assistance operation. This requirement affects all of the authorities described in this section, or the preceding section, unless they already require congressional notification. In practice, DoD provides blanket notification for all PKO or Humanitarian operations where goods or services are being transferred to other nations or international organizations.

C. UN Participation Act (UNPA) § 7 (22 U.S.C. § 287d-1) authorizes support to the UN, upon its request, to assist in the peaceful settlement of disputes (not involving the employment of armed forces under Chapter VII). Includes detail of up to 1000 military personnel as observers, guards, or any other non-combatant capacity, and furnishing of facilities, services, or other assistance and loan of U.S. supplies and equipment. The statute generally requires reimbursement, except when it has been waived in the national interest (authority delegated to DoS by EO 10206, 16 Fed. Reg. 529 (1951)).

D. FAA § 506(a)(1&2) (22 U.S.C. § 2318(a)(1&2)) (Emergency Drawdown). With the limitations discussed above, these drawdowns also may be used to support multilateral peace and humanitarian operations.

E. FAA § 552(c)(2) (22 U.S.C. § 2348(c)(2)) (PKO Drawdown). A FAA § 552 drawdown, of up to \$25 million per year from any Federal agency, may be used to support peace operations in “unforeseen emergencies, when deemed important to the national interest.”

F. Detailing of Personnel. FAA § 627 (22 U.S.C. § 2387) authorizes detailing of officers or employees to foreign governments, when the President determines it furthers the purposes of the FAA. FAA § 628 (22 U.S.C. § 2388) allows similar details to international organizations, to serve on their staff or to provide technical, scientific, or professional advice or services. Per § 630 of the FAA (22 U.S.C. § 2390), detailed individuals may not take an oath of allegiance or accept compensation. 22 U.S.C. § 1451 authorizes the Director of the U.S. Information Agency (USIA) to assign U.S. employees to provide scientific, technical, or professional advice to other countries. This does not authorize details related to the organization, training, operations, development, or combat equipment of a country’s armed forces. 10 U.S.C. § 712 authorizes the President to detail members of the armed forces to assist in military matters in any republic in North, Central, or South America. All of this detailing of personnel may be on a reimbursable or a non-reimbursable basis.

G. FAA § 516 (22 U.S.C. § 2321j) (Excess Defense Articles). Defense articles no longer needed may be made available to support any country for which receipt of grant aid was authorized in the Congressional Presentations Document (CPD). Priority is still accorded to NATO and southern-flank allies. There is an aggregate ceiling of \$425 million per year, beginning in FY 96; cost is determined using the depreciated value of the article. No space available transportation is authorized, normally; but DoD may pay packing, crating, handling and transportation costs to PFP eligible nations under the Support to Eastern European Democracy (SEED) Act of 1989. *See* Defense Security Assistance and Improvements Act, § 105, Pub. L. No. 104-164 (1996).

H. Reimbursable Support. The primary authority for reimbursable support is FAA § 607 (22 U.S.C. § 2357), which authorizes any Federal agency to provide commodities and services to friendly countries and international

organizations on an advance of funds or reimbursable basis. Support to the UN and other foreign nations are usually provided under the terms of a “607 Agreement” with the nation or organization, detailing the procedures for obtaining such support. DoS must authorize DoD to negotiate these agreements. FAA § 632, authorizing transfer of funds from DoS and the Economy Act are also means of providing reimbursable DoD support. Finally, Foreign Military Sales (FMS) or Leases, provided under authority of the Arms Export Control Act (AECA) §§ 21-22 & 61-62 (22 U.S.C. §§ 2761-62 & 2796), respectively, permit the negotiation of FMS contracts or lease agreements to support countries or international organizations. Reimbursement usually includes administrative overhead under Defense Security Cooperation Agency (DSCA) procedures.

I. 10 U.S.C. §§ 2341-2350 (Acquisition and Cross-Servicing Agreements (ACSAs)). As noted previously, these statutory provisions allow DoD to acquire logistic support without resort to commercial contracting or FMS procedures and to transfer support outside of the AECA. After consultation with DoS, DoD may execute agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international or regional organizations for the reciprocal provision of logistic support, supplies, and services. Acquisition and transfers are on a cash reimbursement, replacement-in-kind, or exchange-of-equal-value basis. Many ACSAs already exist. Check CLAMO website for latest list or consult your MACOM or Combatant Command legal advisors for details.

J. Restriction on U.S. participation in U.N. Peacekeeping Operations. The American Servicemembers Protection Act (ASPA), 2002, § 2005, requires that the President certify to Congress that the U.N. Security Council has permanently exempted U.S. forces from the jurisdiction of the International Criminal Court (ICC) or that each of the other Participating States has provided adequate assurances that U.S. personnel would not be subject to the jurisdiction of the ICC, prior to the deployment of U.S. forces on such operations. Article 16 of the Rome Statute of the ICC authorizes the U.N. Security Council acting under Chapter VII of the U.N. Charter to defer any investigation or prosecution by the ICC in a particular case for a twelve-month period. This deferral may be renewed every twelve months. On 12 June 2003, pursuant to a request by the United States, the U.N. Security Council issued UNSCR 1487 exempting personnel of states, such as the U.S., who are not a party to the Rome Statute from jurisdiction of the ICC. As a result, U.S. personnel participating in U.N. Peacekeeping Operations had been exempt from the ICC’s jurisdiction. However, in 2004, the deferral was not renewed. For additional information, *see* Chapter 16 regarding Article 98 agreements and the ICC.

XI. COMBATING TERRORISM

A. Combating Terrorism Readiness Initiative Funds. 10 USC § 166b; CJCSI 5261.01B, July 1, 2001.

1. Section 1512 of the FY 2002 National Defense Authorization Act amends Title 10 to add a new Section 166b. Section 166b codifies the longstanding practice of making funds available for high-priority unforeseen requirements related to combating terrorism. These funds are in addition to any other funds available for the same purpose.

2. Funds may be used for the following activities:

- a. Procurement and Maintenance of physical security equipment;
- b. Improvement of physical security sites;
- c. Under extraordinary circumstances, funds may be used for physical security management planning, procurement and support of security forces and security technicians, security reviews and investigations and vulnerability assessments, and any other activity related to physical security.

3. Priority should be given to emergency or emergent unforeseen high-priority requirements for combating terrorism.

B. Authority to offer and pay rewards to individuals assisting in combating terrorism. 10 USC § 127b. The National Defense Authorization Act of 2003, § 1065, amended Title 10 U.S.C. to add § 127b. This statute

provides that the SECDEF may pay a monetary amount, or provide a payment-in-kind, to a person as a reward for providing the U.S. Government with information or nonlethal assistance that is beneficial to: 1) an operation or activity of the armed forces conducted outside the United States against international terrorism; or 2) force protection of the armed forces. The amount of the award may not exceed \$200,000. The authority of the SECDEF may be delegated only: 1) to the Deputy Secretary of Defense and an Under Secretary of Defense, without further redelegation; and 2) to a combatant commander, but only for a reward in an amount or with a value not to exceed \$50,000. The combatant commander who has been delegated this authority may further delegate that authority, but only for a reward in an amount or with a value not in excess of \$2,500.³² Persons not eligible to receive such a reward under this authority are: (1) a citizen of the United States; (2) an officer or employee of the United States; or (3) an employee of a contractor of the United States.

XII. FUNDING OPERATIONS IN IRAQ

A. Historical Use of Iraqi Funds as an Occupying Power.

1. Operations in Iraq are authorized and funded under several different and evolving authorities. Unlike other operations that would rely primarily on the statutory provisions outlined throughout the Chapter above, operations in Iraq are unique and are authorized under international law (treaty law, supreme law of the land) that had previously allowed for the use of vested and seized properties (discussed below) to fund the reconstruction and humanitarian assistance. Under the Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 1907, [hereinafter Hague Regulations], Article 42, territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised. Thus, the commencement of a military occupation is de facto standard – invasion + firm control. In the current situation depending on which documents one refers to, different dates have been offered as to the commencement of the occupation by coalition forces in Iraq. On 16 April 03, the CENTCOM Commander issued Instructions to the Citizens of Iraq. These clearly spelled out the controls that he was implementing, as the Coalition Force Commander, to include notice of sanction if these controls were violated. In the EO 13315 issued by President Bush on 28 August 03, Section 4(d), defines the “former Iraqi regime” to mean the Saddam Hussein regime that governed Iraq until on or about 1 May 03. The key is that at some point in time, arguably 16 April 03, the coalition forces representing the Occupying Powers began to have certain obligations, to wit authority, under the Hague Regulations and the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949) [hereinafter GCIV]. Initially, to meet these international obligations units had the authority to use their O&M. As the situation quickly evolved, other more specific authorities such as the Commanders’ Emergency Response Program were developed. See section XIII below.

2. The Hague Regulations, Article 55, and GCIV, Article 53, require that the Occupying Power administer immovable public property of the state and the proceeds or products derived from it. In order to implement this obligation, among others, the President, as Commander-in-Chief, in a White House memorandum, dated 30 April 03, confirmed SECDEF’s authority to exercise all powers, consistent with the Law of War, related to the seizure, sale, administration, or use of state- or regime-owned assets, funds, or realizable securities in Iraq. Property seized, sold, or administered under this Presidential delegation of authority are to be used only to assist the Iraqi people and support the reconstruction.

3. On 29 May 03, SECDEF further delegated this authority to the Coalition Provisional Authority (CPA). This memorandum of delegation also addressed vested property authority of which was to pass from the Department of Treasury to the CPA. Vested property is Iraqi assets confiscated by the President under the International Emergency Economic Powers Act (50 U.S.C. § 1601 *et seq.*) within the United States. By 20 May 03, \$1.7 billion had been confiscated under this authority and \$91.6M had been delegated to the SECDEF to assist the Iraqi people and assist in the reconstruction. Additionally, on 29 May 03, the SECDEF approved the initial Procedures for Administering, Using and Accounting for Vested and Seized Iraqi Property. Pursuant to these Procedures the Secretary of the Army was given the responsibility, as the Executive Agent, for receiving, transporting, safeguarding, disbursing, and accounting for the vested and seized property. Seized property is defined in the

³² Note: The combatant commander to whom this authority has been delegated may further delegate that authority to this Deputy Commander for a reward in an amount or with a value not to exceed \$50,000.

memorandum as state- or regime-owned property in Iraq to be held and administered on behalf of, and for the benefit of, the Iraqi people, to assist the Iraqi people and to support the reconstruction of Iraq.

4. On 16 May 03, the CPA issued CPA Regulation #1³³ detailing his authority. Subsequently, on 10 June 03, the CPA issued CPA Regulation #2 establishing the Development Fund for Iraq (DFI). This fund is held by the Central Bank of Iraq but administered by the CPA. The DFI is comprised of 95% of proceeds from export sales of petroleum, petroleum products, natural gas from Iraq, and any returned Iraqi assets provided by U.N. member states. The DFI is to be used for the humanitarian needs of the Iraqi people; for the economic reconstruction and repair of Iraq's infrastructure; for the continued disarmament of Iraq; for the costs of Iraq's civil administration and for other purposes the Administrator, the CPA, determines to be for the benefit of the people of Iraq.

B. Unique Statutory Reconstruction Authorities for Iraq.

1. **Natural Resources Risk Remediation Fund.** Through the Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11 (Apr. 16, 2003), Congress authorized \$489.3 million to be transferred into the Natural Resources Risk Remediation Fund from the newly established Iraq Freedom Fund. These funds were made available to be used in and around Iraq for emergency fire fighting, repair of damage to oil facilities and related infrastructure, and preserve distribution capability. These transferred funds remain available until expended.

2. **Iraq Relief and Reconstruction Fund.** Through the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan for FY 2004, Pub. L. No. 108-106 (2003), Congress appropriated \$18.65B for the Iraq Relief and Reconstruction Fund (IRRF). Congress specifically directed for what purpose the money is to be used, giving the President some authority to reallocate funds. The IRRF dollars are apportioned between the Coalition Provisional Authority (CPA) (until it dissolved 30 June 2004 and now is the responsibility of the Project Contract Office), DoS, Department of Health and Human Services, DoD, Department of Treasury, and USAID. These funds remain available until 30 September 2006.

XIII. MILITARY CONSTRUCTION (MILCON) -- A SPECIAL PROBLEM AREA³⁴

A. **Definitions.** "Military Construction," as defined in 10 U.S.C. § 2801 and AR 415-15, includes any construction, development, conversion, or extension carried out with respect to a military installation. The definition of a military installation is very broad and includes foreign real estate under the operational control of the U.S. military. Pursuant to the Emergency Wartime Supplemental Appropriations Act for the Fiscal Year 2003, P.L. 108-11, 117 Stat. 587 (2003), this definition has been further expanded to include "any building, structure, or other improvement to real property to be used by the Armed Forces, *regardless of whether such use is anticipated to be temporary or of longer duration.*" "Military Construction Project" includes all work "necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility." See The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpub.) (prohibiting project splitting to avoid statutory thresholds). As defined further in AR 415-15, Glossary, sec. II, Terms, construction includes the following:

1. The erection, installation, or assembly of a new facility;
2. Change to a real property facility, such as addition, expansion, or extension of the facility, which adds to its overall external dimensions;
3. Acquisition of an "existing facility," or work on an existing facility that improves its functions or enables it to fulfill changed requirements. Such work is often called an alteration of the facility and includes installation of equipment made a part of the existing facility;

³³ All of the current CPA Regulations, Orders, and Memoranda are located at <http://www.cpa-iraq.org>.

³⁴ See James Dorn, *Combat and Contingency Related Construction: "Upon this Point a Page of History is Worth a Volume of Logic,"* ARMY LAW., January 2005, at 178.

4. Conversion of the interior or exterior arrangements of a facility so that the facility can be used for a new purpose. This includes installation of equipment made a part of the existing facility;

5. Replacement of a real property facility, which is a complete rebuild of a facility that has been destroyed or damaged beyond economical repair;

6. Relocation of a facility from one installation to another and from one site to another;

7. Costs of installed equipment made part of a new or existing facility, related site preparation, excavation, filling, landscaping, or other land improvements; and

8. Relocatable buildings in some circumstances. Specifically, if the estimated funded and unfunded costs of building disassembly, repacking, and nonrecoverable building components (including foundation) exceed 20 percent of the acquisition costs of the relocatable building, it must be approved and funded as “military construction.” *See* Memorandum, Assistant Chief of Staff for Installation Management, Subject: Interim Army Policy for Relocatable Buildings (21 Oct. 2004); DoDI 4165.56, Relocatable Buildings, (13 Apr. 1988). *See also* AR 420-18, Facilities Engineering, Materials, Equipment, and Relocatable Building Management (3 Jan. 1992); AFI 32-1021, Planning and Programming of Facility Construction Projects (12 May 1994); and OPNAVIST 11010.33 B, Procurement, Lease and Use of Relocatable Buildings (14 July 1988).

B. Maintenance and Repair Are Not Construction.

1. Maintenance is recurring work to prevent deterioration, *i.e.*, work required to preserve or maintain a facility in such condition so it is usable for its designated purpose. AR 420-10, Management of Installation Directorates of Public Works, Glossary, Sec. II, Terms (15 April 1997).

2. Repair is restoration of a facility so that it may be used for its designated purpose, by overhauling, reprocessing, or replacing parts or materials that have deteriorated by action of the elements or by wear and tear in use, and which have not been corrected through maintenance. When repairing a facility, its components may be repaired by replacement, and the replacement can be up to current standards or codes. *See* DoD Reg. 7000.14-R, vol. 2B ch. 8 para. 080105. The Army requires that a facility or component of a facility be in a “failed or failing” condition to qualify as a repair project. *See* Memorandum, Assistant Chief of Staff for Installation Management, Subject: New Definition of “Repair” (4 Aug. 1997) and AR 415-15, para. 2-3b.

3. When construction and maintenance or repair are performed together as an integrated project, each type of work is funded separately, unless the work is so integrated that separation of construction from maintenance or repair is not possible. In the latter case, fund all work as construction. AR 420-10, Glossary, Sec. II, Terms.

C. Construction Using O&M Funds.

1. Deployed commands normally receive only O&M-type funds. In this context, the O&M may be from humanitarian or foreign disaster assistance appropriation, but is used as a generic O&M fund would be, *i.e.*, to conduct the specified operation.

a. 10 U.S.C. § 2805(c) authorizes the use of O&M funds for unspecified minor military construction up to \$750,000 per project. The statute increases this threshold to \$1.5 million if the project is “solely to correct a deficiency that threatens life, health, or safety.”

(1) There is no statutory guidance as to what constitutes “a deficiency that threatens life, health, or safety.” Further, DoD and Army Regulations do not assist in defining this criteria. At least one Army MACOM has issued limited guidance. *See* Appendix B: Memorandum, Deputy Chief of Staff for Personnel and Installation Management, AFEN-ENO, Subject: Funding and Approval Authority, 6 March 2000. The Air Force requires prior approval of SAF/MII and Congressional notification for projects solely to correct a life, health, or safety deficiency that exceed \$500,000. AFI 32-1032, para 5.1.2.1.

(2) As a matter of DoD policy, commanders must use O&M for these projects. *See* AR 415-15 (4 Sep. 1998); DA Pam 420-11 (7 Oct 1994). However, an exception to this rule is that commanders must use Unspecified Minor Military Construction (UMMC) funds, not O&M, for all permanent construction during OCONUS CJCS exercises. *See* 10 U.S.C. § 2805(c)(2). DoD also must notify Congress if commanders intend to undertake construction (temporary or permanent) during any exercise, and the cost of the construction is expected to exceed \$100,000. *See* Military Construction Appropriation Act, 2004, Pub. L. No. 108-132, 117 Stat. 1374, (2003) § 113.

b. A “Military Construction Project” includes all work necessary to produce a “complete and usable facility, or a complete and usable improvement to an existing facility.” 10 U.S.C. § 2801(b). Splitting projects into separate parts so as to stay under the \$750,000 O&M threshold is strictly prohibited. *See* AR 415-32, Glossary, sec. II; AR 420-10, para. 4-1b; DA Pam 420-11, Glossary, sec. II; AFI 32-1021, para 4.2; OPNAVINST 11010.20F, para. 6.2.1.

c. Only funded costs count against the \$750,000 O&M threshold. Funded costs are the “out-of-pocket” expenses of a project, such as contract costs, TDY costs, materials, etc. It does not include the salaries of military personnel, equipment depreciation, and similar “sunk” costs. The cost of fuel used to operate equipment is a funded cost. Segregable maintenance and repair costs are not funded costs. *See* DA Pam 420-11, Glossary.

2. Methodology for analyzing construction funding issues:

- a. Define the scope of the project (*i.e.*, what is the complete and usable facility?);
- b. Classify the work as construction, repair, or maintenance;
- c. Determine the funded cost of the project;
- d. Select the proper appropriation; and
- e. Verify the identity of the proper approval authority.

D. Construction Using O&M Funds During Combat or Declared Contingency Operations.

1. Within the last two years, significant changes have taken place in the funding of combat- and contingency-related construction. In order to understand the current state of the law, it is necessary to examine these changes as they have taken place.

2. Prior to April 2003, per Army policy, use of O&M funds in excess of the \$750,000 threshold discussed above was proper when erecting structures/facilities in direct support of combat or contingency operations declared pursuant to 10 U.S.C. § 101(a)(13)(A). *See* Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000). This policy applied only if the construction was intended to meet a temporary operational need that facilitated combat or contingency operations. The rationale for this opinion was that O&M funds were the primary funding source supporting contingency or combat operations; therefore, if a unit was fulfilling legitimate requirements made necessary by those operations, then use of O&M appropriations was proper.

3. On 27 February 2003, DoD issued similar guidance. *See* Memorandum, Under Secretary of Defense, (Comptroller), Subject: Availability of Operation and Maintenance Appropriations for Construction, (27 Feb. 2003). The DoD memorandum, in effect, adopted the Army’s policy as articulated in the 22 February 2000 memorandum at the DoD level.

4. On 16 April 2003, the President signed the Emergency Wartime Supplemental Appropriation for Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). The act’s accompanying conference report stated, in rather harsh language, the conferees’ legal objections to the Under Secretary of Defense (Comptroller)’s 27 February 2003 policy memorandum. The conference report had the practical effect of invalidating the policy guidance articulated

in both the 22 February 2000 Deputy General Counsel (Ethics & Fiscal), Department of the Army Memorandum, as well as the 27 February 2003 Under Secretary of Defense (Comptroller) Memorandum.

5. On 6 November 2003, the President signed the Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, 117 Stat. 1209 (2003). Section 1301 of the act provided “temporary authority” for the use of O&M funds for military construction projects during FY 04 where the Secretary of Defense determines: (a) the construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of Operation Iraqi Freedom or the Global War on Terrorism; (b) the construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence; (c) the United States has no intention of using the construction after the operational requirements have been satisfied; and, (d) the level of construction is the minimum necessary to meet the temporary operational requirements. Pursuant to this act, temporary funding authority was limited to \$150 million.

6. On 24 November 2003, the President signed the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1723 (2003). Section 2808 of the authorization act increased the amount of O&M funds that DoD could spend on contingency and combat related construction in FY 04 to \$200 million, and adopted, virtually unchanged, the determination requirements of the FY 2004 Emergency Supplemental Appropriation. Further, Section 2810 of the Ronald W. Reagan National Defense Authorization Act for 2005, Pub. L. No. 108-767, 118 Stat. 1811 (2004) extended the funding authority to use O&M funds for such projects into FY 05, limited to \$200 million for the fiscal year.

7. On 1 April 2004, the Deputy Secretary of Defense issued implementing guidance for Section 2808 of the FY 2004 Defense Authorization Act. *See* Memorandum, Deputy Secretary of State, Subject: Use of Operation and Maintenance Appropriations for Construction During Fiscal Year 2004 (1 April 2004). Pursuant to this guidance, Military Departments or Defense Agencies are to submit candidate construction projects exceeding \$750,000 to the Under Secretary of Defense (Comptroller). The request will include a description and the estimated cost of the project, as well as a certification by the Secretary of the Military Department or Director of the Defense Agency that the project meets the conditions stated in Section 2808 of the FY 04 Defense Authorization Act. The Under Secretary of Defense (Comptroller) will review the candidate projects in coordination with the Under Secretary of Defense (Acquisition, Technology, and Logistics), and the Under Secretary of Defense (Comptroller) will notify the Military Department or Defense Agency when to proceed with the construction project. The memorandum provides a draft format to be used for project requests, and is available at: <http://www.acq.osd.mil/dpap/Docs/policy/use%20of%20operation%20and%20maintenance%20appropriations%20or%20construction%20during%20fy2004.pdf>.

8. **Bottom Line.** As a result of recent congressional developments, DoD can no longer fund combat and contingency related construction projects costing in excess of \$750,000 (or \$1.5 million, if solely to correct a deficiency that threatens life, health, or safety) without first identifying clear, affirmative legislative authority. Section 2810 of the FY 05 Defense Authorization Act provides such authority. However, this authority is of limited scope, funding, and duration. Where this will leave the DoD in future years, or when the \$200 million limit is exhausted, is an open question. Further, there is no guarantee Congress will extend this authority into FY 06. Judge Advocates are advised to keep abreast of the latest developments in this field before giving advice on proposed construction projects.

E. The Unspecified Minor MILCON (UMMC) Program.

1. Normal construction funding rules apply when the aforementioned conditions are not met, including the funding of construction for which the United States would have a follow-on or contingency use after the termination of military operations necessitating the construction. Thus, assuming the funded costs of a construction project exceed \$750,000, commanders must seek special funding and approval to proceed. One alternative is to obtain Unspecified Minor Military Construction (UMMC) funds. Under this program, Congress funds minor military construction projects with estimated costs between \$750,000 and \$1.5 million (up to \$3 million if the project is intended to correct a deficiency that threatens life, health, or safety).

2. Commanders also must use UMMC funds for all permanent construction during CJCS-coordinated or directed OCONUS exercises. *See* 10 U.S.C. § 2805(c)(2). The authority for exercise-related construction is limited to no more than \$5 million per military department per fiscal year. *See* 10 U.S.C. § 2805(c)(2). This limitation does not affect funding of minor and truly temporary structures such as tent platforms, field latrines, shelters, and range targets that are removed completely once the exercise is completed. Units may use O&M funds for these temporary requirements. Again, however, congressional notification is required for any construction in excess of \$100,000. *See* Military Construction Appropriation Act, 2000, Pub. L. No. 106-52, § 113, 113 Stat. 264 (1999).

F. Application of the Rules.

1. An Army unit deploys to central Asia in direct support of the Global War on Terrorism. A large warehouse facility is proposed for conversion to an administration facility. The Division Engineer advises the work will include: (a) replacing the roof, the flooring, several interior walls, and the heating system (\$1.1 million); (b) repairing numerous other failing components of the building (\$450,000); (c) installing new air-conditioning (\$150,000); and (d) constructing new walls to accommodate the new configuration (\$100,000). The Division Engineer proposes to classify the project work as mostly repair work, with a small amount of new construction. The total funded cost of the project is estimated to be \$1.8 million. Because the air-conditioner and new walls will cost only \$250,000, the Division Engineer contends that the entire project can be approved locally and funded with O&M. Is the Division Engineer right? No. By definition, a conversion is construction. All work is required for the conversion of this building to a complete and usable administrative facility, so it must all be funded as construction (use MILCON money because the cost exceeds \$1.5 million, or seek approval for the project pursuant to Section 2810 of the FY 05 Defense Authorization Act).

2. The road to the same unit's fuel supply point needs immediate repair. The division's OPTEMPO increased substantially in the past few weeks, so the road has been used more and by vehicles heavier than it was designed to handle. Delivery trucks used by the fuel supplier have been breaking up the road. The Division Engineer believes that, in addition to filling potholes, two inches of asphalt must be added to support the increased and heavier traffic. The sustainment contractor estimates costs of \$780,000 to fill the holes and add two inches of asphalt. The Division Engineer insists that O&M funds may be used. Is the Engineer correct? Maybe. Filling the potholes is clearly a repair, and this cost does not count against the cost of the construction effort. Resurfacing the road may be a repair if the resurfacing is intended to restore the road to its former capacity, not to improve it for heavier use, and if this is the method normally used to maintain and/or repair roads of this type. To the extent it upgrades the road, however, it may be construction, particularly considering the fact that the exterior dimensions of the road will change (two inches thicker). The cost of this portion of the work may be less than \$750,000 (if the potholes cost more than \$30,000 to repair), however, so O&M funds may be appropriate for this work even if it is considered construction. Bottom line: if the funded costs of the construction portion of the work exceed \$750,000, the command should seek UMMC funding, or alternatively seek approval for the project pursuant to Section 2810 of the FY 05 Defense Authorization Act.

G. Other Construction Authorities. The following additional authorities are available to DoD to fund combat and contingency related construction projects. However, such authorities are rarely used because their requirements include Congressional notification, and in the case of 10 U.S.C. § 2808 and 10 U.S.C. § 2803, the reprogramming of unobligated military construction funds.

1. **Projects Resulting from a Declaration of War or National Emergency.** Upon a presidential declaration of war or national emergency, 10 U.S.C. § 2808 permits the Secretary of Defense to undertake construction projects not otherwise authorized by law that are necessary to support the armed forces. These projects are funded with unobligated military construction and family housing appropriations, and the Secretary of Defense must notify the appropriate committees of Congress of (a) the decision to use this authority; and (b) the estimated costs of the construction project. On 16 November 2001 President Bush invoked this authority in support of the Global War on Terrorism. *See* Executive Order 13235, Nov. 16, 2001, 66 Fed. Reg. 58343.

a. **Emergency Construction, 10 U.S.C. § 2803.** Limitations: (a) a determination by the Service Secretary concerned that the project is vital to national defense; (b) a 21-day congressional notice and wait period; (c) a \$45 million cap per fiscal year; and (d) a requirement that the funds come from reprogrammed, unobligated military construction appropriations.

b. **Contingency Construction, 10 U.S.C. § 2804.** Limitations similar to those under 10 U.S.C. § 2803 apply; however, Congress specifically appropriates funds for this authority. In 2003, Congress dramatically increased the amount of funding potentially available to DoD under this authority. *See* Emergency Wartime Supplemental Appropriations for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). Section 1901 of the supplemental appropriation authorized the Secretary of Defense to transfer up to \$150 million of funds appropriated in the supplemental appropriation for the purpose of carrying out military construction projects not otherwise authorized by law. The conference report accompanying the supplemental appropriation directed that projects that previously had been funded under the authority of the DoD Deputy General Counsel (Fiscal) 27 February 2003 memorandum, must be funded pursuant to 10 U.S.C. § 2804 in the future. However, because the 2004 and 2005 Defense Authorization Acts authorized DoD to spend up to \$200 million per fiscal year on such construction projects, DoD's authority to fund projects pursuant to 10 U.S.C. § 2804 was later significantly reduced. *See* Pub. L. 108-767, 118 Stat. 1811, Section 2404(a)(4) (limiting funding under this authority to \$10 million for fiscal year 2005).

XIV. CONGRESSIONAL NOTIFICATION AND HUMAN RIGHTS VETTING REQUIREMENTS

A. **Section 8064 Notification – Limitation on Transfer of Defense Articles and Services.** Continuing similar requirements from prior years' appropriations acts, Congress requires DoD to notify the Congressional appropriations, defense, and international relations committees 15 days *before* transferring to another nation or international organization any defense articles or services (other than intelligence services) in conjunction with (1) peace operations under chapters VI or VII of the UN charter or (2) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation. *See* DoD Appropriations Act for FY 05, Pub. L. No. 108-287 § 8064 (2004). The notice required includes the following: a description of the articles or services to be transferred; the value of the articles or services; and, with respect to a proposed transfer of supplies and equipment, a statement of whether the inventory requirements of all elements of the armed forces (including the Reserve Components) for the types of articles and supplies to be transferred have been met; and whether the items to be provided will have to be replaced, and how the President proposes to pay for such replacement. Initially, this notification requirement was enacted through Section 8117 of the DoD Appropriations Act for FY 1996, Pub. L. No. 104-61 (1995). Leading up to the original House DoD Appropriations Bill (H.R. 2126) enactment, the House Appropriations Committee expressed concern about the *diversion of DoD resources to non-traditional operations*, such as Haiti, Guantanamo, Rwanda and the former Yugoslavia. The Committee stated that Congress must be kept fully aware of the use and involvement of defense assets in "essentially non-defense activities in support of foreign policy." H.R. Rep. No. 208, 104th Cong., 1st Sess. 12 (1995). In "acquiescing" in the Appropriations Act, the President expressed concern about section 8117 and pledged to interpret it consistent with constitutional authority to conduct foreign relations and as Commander in Chief. Statement by the President (Nov. 30, 1995).

B. **Section 8076 Prohibition on Funding for Training of Foreign Units that Commit Gross Violations of Human Rights – Human Rights Vetting.** DoD Appropriations Act for FY 2005, Pub. L. No. 108-287, § 8076. Continuing similar prohibitions from prior years' appropriations Acts, Congress prohibited any funding for support of any training program involving a unit of the security forces of a foreign country if the [SECDEF] has received credible information from the [DoS] that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken.

XV. CONCLUSION

A. Congress limits the authority of DoD and other executive agencies to use appropriated funds. The principal fiscal controls imposed by statute, regulation, and case law are Purpose, Time and Amount. These controls apply both to CONUS activity and OCONUS operations and exercises. The Comptroller General, service audit agencies and inspectors general monitor compliance with rules governing the obligation and expenditure of appropriated funds. Commanders and staff rely heavily on JAs for fiscal advice. Active participation by JAs in mission planning and execution, as well as responsive and well-reasoned legal advice, will help ensure that commands use appropriated funds properly. Those found responsible for funding violations will face adverse personnel actions and possibly criminal sanctions.

B. JAs must ensure that the military's participation in a Title 22 foreign assistance activity or in a Title 10 military cooperation or humanitarian operation accomplishes the commander's intent and complies with U.S. fiscal law, regulations and policy.

C. Necessity for the JA to Get It Right.

1. Military commanders and staffs often plan for complex, multi-faceted, joint and combined operations, exercises and activities overseas. Not only do foreign allies participate in these activities, but so too do other U.S. government agencies, international non-governmental organizations, and U.S. Guard and Reserve components. Not surprisingly, these operations, exercises and activities are conducted under the bright light of the U.S. and international press, and thus precise and probing questions concerning the legal authority for the activity are certain to surface. Congress will often have an interest in the location, participants, scope and duration of the activity. Few operations the U.S. military conducts overseas escape Congressional interest. Thus, it is imperative that the commander and his or her staff be fully aware of the legal basis for the conduct of the operation, exercise or activity that benefits a foreign nation.

2. JAs bear the primary responsibility for ensuring that all players involved, but especially the U.S. commander and his or her staff, understand and appreciate the significance of having a proper legal basis for the activity. This fundamental understanding will shape all aspects of the activity, especially a determination of where the money will come from to pay for the activity. Misunderstandings concerning the source and limits of legal authority and the execution of activities may lead to a great deal of wasted time and effort to correct the error, and embarrassment for the command in the eyes of the press and the Congress. At worst, such misunderstandings may lead to violations of the ADA, and possible reprimands or criminal sanctions for the responsible commanders and officials.

D. How the JA Can Get It Right—Early JA Involvement.

1. JAs must be part of the planning team from the inception of the concept, through all planning meetings, through execution of the operation or activity. It is too late for the JA to review the operations plan the week, or even the month, before the scheduled event. Funding, manpower, logistics, transportation and diplomatic decisions have long been made, and actions based on those decisions have already been executed weeks in advance of the activity.

2. In short, the JA must understand the statutory, regulatory and policy framework that applies to military operations and activities that benefit foreign nations. More importantly, the JA must ensure that the commander understands what that legal authority is and what limits apply to the legal authority. The JA must then ensure that the commander complies with such authorities.

